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APPENDIX A

BENETTA BUELL-WILSON et al.,
Plaintiffs and Respondents,
v.
FORD MOTOR COMPANY et al.,
Defendants and Appellants.

D045154, D045579

COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT,
DIVISION ONE

141 Cal. App. 4th 525;
46 Cal. Rptr. 3d 147;
2006 Cal. App. LEXIS 1089;
2006 Cal. Daily Op. Service 6512;
2006 Daily Journal DAR 9367

July 19, 2006, Filed

COUNSEL: Gibson, Dunn & Crutcher, Theodore J. Boutrous, Jr., William E. Thomson, Eileen M. Ahern, Theodore B. Olson and Paul DeCamp for Defendants and Appellants.

Kirkland & Ellis, C. Robert Boldt, Christopher Landau, Erin Morrow; National Chamber Litigation Center, Robin S. Conrad and Amar D. Sarwal for The Chamber of Commerce of the United States of America as Amicus Curiae on behalf of Defendants and Appellants.

Mayer, Brown, Rowe & Maw and Donald M. Falk for The Product Liability Advisory Council, Inc., as Amicus Curiae on behalf of Defendants and Appellants.

O'Melveny & Myers, Brian D. Boyle, Matthew M. Shors, Charles E. Borden and Arthur W. S. Duff for The Alliance of Automobile Manufacturers as Amicus Curiae on behalf of Defendants and Appellants.

Howard, Rice, Nemerovski, Canady, Falk & Rabkin, Jerome B. Falk, Jr., Steven L. Mayer, Keith D. Kessler; Hancock, Rothert & Bunshoft, Paul D. Nelson, Paul J. Killion, Jacqueline G. Elliopulos, Leslie Kurshan, Michael J. Dickman; Schoville & Arnell, Dennis A. Schoville, Louis G. Arnell and James S. Iagmin for Plaintiffs and Respondents.

JUDGES:
Nares, J., with McConnell, P. J.,
and Irion, J., concurring.

OPINION BY: Nares

OPINION: NARES, J.—Benetta Buell-Wilson (Mrs. Wilson) brought this action against Ford Motor Company (Ford) and Drew Ford (Drew)[1] as a result of the rollover and roof crush of her Ford Explorer (Explorer) that left her a paraplegic. Mrs. Wilson's husband Barry Wilson (Mr. Wilson) brought a claim for loss of consortium against Ford and Drew. A jury found in favor of Mrs. Wilson and Mr. Wilson (together the Wilsons), finding that (1) the Explorer was defectively unstable; (2) the Explorer was not crashworthy due to a defect in the roof; (3) Drew failed to warn the Wilsons that the Explorer was defectively unstable; and (4) Ford and Drew failed to warn the Wilsons of the danger posed by the defect in the roof. The jury awarded Mrs. Wilson $109,606,004 in damages for her injuries,

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[1] Ford Motor Company refers to itself and Drew Ford collectively as "Ford," except where necessary to distinguish between the two. Accordingly, we do the same in this opinion.

consisting of $4,606,004 in economic damages and $105 million in noneconomic damages, and awarded Mr. Wilson $13 million for his loss of consortium. The jury also found that Ford acted with "oppression, fraud or malice" and awarded the Wilsons $246 million in punitive damages. The court later reduced Mrs. Wilson's total compensatory damages award to $70 million, resulting in an award of $4,606,004 in economic damages and $65,393,996 in noneconomic damages. The court reduced Mr. Wilson's loss of consortium damages to $5 million. The court reduced the punitive damages award to $75 million, a one-to-one ratio to the Wilsons' total reduced award of compensatory damages.

On appeal Ford asserts (1) it is entitled to a new trial because the court erroneously admitted evidence about stability problems with a predecessor vehicle, the Ford Bronco II (Bronco II), and erroneously excluded evidence of the Explorer's "real-world" safety record and comparative data; (2) the noneconomic portion of the compensatory damages award was excessive and an unconstitutional violation of Ford's due process rights; (3) punitive damages were improperly awarded because (a) at most the Wilsons proved that "reasonable people could disagree regarding" the design decisions Ford made, and (b) California's punitive damages law is unconstitutionally vague as applied; and (4) the punitive damages award was excessive and the product of improper considerations. We granted permission to The Chamber of Commerce of the United States of America (the Chamber), The Alliance of Automobile Manufacturers (AAM) and The Product Liability Advisory

Council, Inc. (PLAC), to file amicus curiae briefs to support Ford's contentions on appeal.[2]

We hold that (1) the award of noneconomic damages to Mrs. Wilson, as reduced by the trial court, is excessive under California law, is the product of "passion or prejudice," and must be reduced to $18 million; (2) the reduced award for loss of consortium in the amount of $5 million is reasonable and is affirmed; and (3) the award of punitive damages is excessive, violates federal due process limitations, and must be reduced to $55 million, a ratio of approximately two to one to the total compensatory damage award, after our reduction, of $27,606,004 ($4,606,004 in economic damages + $18 million in noneconomic damages + $5 million for loss of consortium). We issue a remittitur conditioning affirmance of the judgment on the Wilsons' agreement to those reductions. Thus, if the Wilsons accept the remittitur, the total judgment will be reduced to $82,606,004 ($4,606,004 in economic damages + $18 million in noneconomic damages + $5 million in loss of consortium + $55 million in punitive damages). We reject the remainder of the arguments made by Ford and amici curiae.[3]

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[2] Ford separately appealed the underlying judgment and the court's rulings on posttrial motions. On January 26, 2005, by stipulation of the parties, these two appeals were ordered consolidated.

[3] The Wilsons also appealed the judgment, but have voluntarily dismissed their appeal. Following briefing in this matter, the Wilsons filed a motion to strike allegedly false statements made in Ford's reply brief. We ordered the motion considered concurrently with the appeal. We deny the motion to strike, but note that in resolving this appeal we have not considered any statements that are not supported by the record. The Wilsons filed a motion for judicial notice, requesting that we take judicial notice of the legislative history of the

[Footnote continued on next page]

FACTUAL AND PROCEDURAL BACKGROUND

A. The Accident

At around 5:00 p.m. on January 19, 2002, Mrs. Wilson, a married 46-year-old graduate student and mother of two, was driving her 1997 four-door Explorer within the speed limit on Interstate 8 near Alpine, California. The road was dry and sloped slightly downhill.

Suddenly, Mrs. Wilson saw what appeared to be a metal object break loose from a motor home in front of her and bounce directly toward her windshield. As she swerved to avoid the object, the wheels on the passenger side lifted from the road, and the Explorer went out of control. The vehicle fishtailed multiple times across lanes and rolled four and a half times, coming to rest on its roof on the road's shoulder. Ford conceded at trial that Mrs. Wilson bore no fault for the accident.

As the Explorer rolled, the roof's pillars and rails crumpled, and the roof crushed down more than 10 inches, causing severe injuries to Mrs. Wilson. Inside the vehicle, she hung upside down from her seatbelt, in "crushing . . . unbelievable pain," gasping for breath and feeling as if her life were fading away. Motorists stopped to assist and struggled to flip the vehicle, and rescue crews cut the roof open to remove her. An ambulance took her from the scene to a life flight helicopter, which flew her to Sharp Memorial Hospital (Sharp) trauma center.

B. Mrs. Wilson's Injuries

[Footnote continued from previous page]

1987 amendment to Civil Code section 3294, as well as portions of the legislative histories for unenacted Assembly Bill No. 2880, unenacted Assembly Bill No. 2582, and pending Senate Bill No. 1429. We grant this unopposed request.

1. Physical injuries

The compressive forces from the collapsing roof fractured and severed Mrs. Wilson's spine at the T12 level, where the thoracic and lumbar regions meet. She will never recover sensation or function below the level of that injury. She also suffered facial injuries, fractured ribs, a cut spleen that caused internal bleeding, a fractured leg and torn PCL and ACL ligaments in both knees, causing bilateral knee dislocations.

In addition to the vertebral fractures, the spinal sac was damaged, causing leaking of cerebral spinal fluid, and portions of the spinal cord and nerve root were pulverized. Doctors inserted metal screws and rods into her back to stabilize her upper body. After almost two weeks, she was transferred to Sharp's rehabilitation center, where she spent another two and a half months.

Mrs. Wilson's resulting paraplegia ended her active life and forced her to painfully relearn basic aspects of daily living, some of which she will never regain. She lives in severe and constant pain that will increase over time. Her accident left her with no sensation from the waist down, except "phantom pain"—a constant burning sensation below her ribs. Above her waist, she suffers constant pain, feels painful pressure on her ribs from the rods in her back, and has intermittent spasms of stabbing pain.

Medication can provide temporary pain relief, but the strong medication needed has serious side effects. It causes her to lose alertness, which makes it impossible to drive. It interferes with her ability to communicate socially. It makes her unsteady in her wheelchair. She also runs the risk of becoming addicted to the medication. There is a constant conflict between efforts to reduce her pain and the debilitating side effects of the medicine itself.

The spinal injury caused a total loss of bladder and bowel control. She must now catheterize herself multiple times daily. Her feces must be manually extracted. In addition to the emotional pain and humiliation from losing control over her bodily functions, she suffers recurring urinary tract infections, which expose her to a potentially fatal kidney disease. Mrs. Wilson is allergic to commonly prescribed medications, including sulfa and penicillin, and her chronic use of antibiotics to fight infections has caused resistance to other drugs.

Mrs. Wilson also suffers severe bruising, which takes months to heal due to diminished circulation in her lower body. Her feet swell and are susceptible to cracking and bleeding. The constant grinding of her shoulder joints from wheeling her wheelchair has caused shoulder problems, which will worsen over time. She suffers disfigurement, with one leg smaller than the other and large surgical scars across her back.

2. Mental and emotional injuries

Before the accident, Mrs. Wilson was an active, athletic, outdoors woman, with a black belt in martial arts. She often camped and hiked with her family, backpacked with Girl and Boy Scouts, helped with the San Diego Tracking Team, and did projects at Mission Trails Regional Park. She and her husband took dancing lessons, traveled and took walks.

She no longer can engage in any of the active lifestyle she once enjoyed, including swimming, skiing, snowboarding, dancing, backpacking and walking. Mrs. Wilson was finishing her masters degree in education and was about to start a second career as a teacher. These plans also have been indefinitely delayed and it is unclear whether they are now possible.

Mrs. Wilson is unable to visit all the rooms in her home—including her own bedroom—because they are

inaccessible to her. She and Mr. Wilson must sleep in their laundry room.

She has changed from a giving, enthusiastic, independent person who took joy in aiding others, to being dependent on others for almost every aspect of her life. Her husband and children are now her caregivers.

C. Mr. Wilson's Loss of Consortium

The injuries to his wife dramatically changed Mr. Wilson's life as well. The Wilsons no longer share the physical relationship they had prior to the accident. Instead, he is now her caregiver and must assist her with the most personal of care, including showering and catheterizing her. He assists her in transferring in and out of her wheelchair and worries that she may fall if she tries to transfer on her own. Several times per night, he wakes to turn his wife over in bed so that she will not get bedsores.

Mr. Wilson has had to decrease his work schedule as an attorney to assist his wife during the day and accompany her to medical appointments and therapy. He performs the household work that his wife can no longer do. The Wilsons spend most of their time trying to accomplish the mundane chores of daily life. Every day Mr. Wilson shares his wife's constant pain, frustration and anxiety in living with her injuries.

D. The Explorer's Defects

The Wilsons submitted evidence at trial that the accident and resulting injuries were caused by two independent defects in the 1997 Explorer. They established that the Explorer's design was dangerously unstable and prone to rollover due to its overly narrow track width and high center of gravity. They also established that the Explorer's roof was inadequately supported and defectively weak, so that it readily crushed into the passenger compartment when subjected to the forces inherent in a foreseeable rollover.

Ford has not challenged on appeal the sufficiency of the evidence supporting the jury's finding that the Explorer was defective on either of these grounds.[4] We therefore review the evidence in the light most favorable to the judgment, disregarding contrary evidence submitted by Ford. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053 [68 Cal.Rptr.2d 758, 946 P.2d 427].)

1. Stability defects

Long before the Wilsons purchased their Explorer, Ford's engineers knew that the vehicle's design was unstable and prone to rollover in emergency maneuvers due to its high center of gravity and narrow track width. Ford had known for decades the importance of vehicle stability in emergency maneuvers. It knew that on flat, dry pavement, a car or truck should slide out, rather than roll.

The Explorer was derived from the Bronco II and evidence of its development history was presented to the jury to show them how and why the Explorer's instability defect came to exist. In 1981, two years before the Bronco II's introduction, Ford measured the stability index (SI) of its competitor, the Jeep CJ7, which had a widely reported rollover problem. The SI is the average of front and rear track width, divided by the center of gravity height. The higher the SI rating (*i.e.*, the wider the track and lower the center of gravity), the more stable the vehicle. The Jeep's SI was 2.04. The Bronco II's SI was less, measuring 1.86. The Bronco II was so unstable it would roll over at only 30 mph on Ford's test track. Ford engineers proposed improving its stability

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[4] Ford does assert that the court erroneously admitted evidence that supported the jury's finding on liability and erroneously excluded evidence that supported its defense. However, as is discussed, post, those evidentiary rulings were not an abuse of discretion.

index by widening its track width. Because doing so would have delayed the vehicle's release date and impacted profits, that proposal was rejected by management.

Ford knew that people were being seriously injured in Bronco II rollovers when the Explorer was being developed. In April 1989, a year before the Explorer release date, Ford executives objected to and tried to stop the release of a damaging Consumer Reports article on Bronco II instability.

Regarding these efforts, Jerry L. Sloan of Ford's public affairs office wrote: "We think going in we were in deep trouble regarding our rollover rates . . . . [¶] . . . Our rollover rate is three times higher than the Chevy S-10 Blazer. . . . [T]he [Fatality Analysis Reporting System (FARS)] data put us in a bad light. . . . [¶] . . . [¶] We think, however, that we have clouded their minds . . . ."

Instead of making design improvements in stability for the Explorer, Ford utilized the Bronco II platform. The Explorer had almost exactly the same track width, high engine mount and elevated center of gravity as the Bronco II, which caused the same instability problems. Over half the parts for the four-door and 80 percent for the two-door Explorer were carried over from the Bronco II.

Ford's design engineers repeatedly requested Ford to widen the track width and lower the center of gravity on the Explorer to increase its stability. However, management declined to do so. As acknowledged by Robert Simpson, a program manager for the development of the Explorer, this was because of "the . . . investment that Ford had sunk into the Explorer," and, as the Wilsons' expert, Dr. David Renfroe, explained, it was also because its "directive was to meet Job 1 [the release date]." Dr. Renfroe also explained that "the engineers were proposing to make [stability index] changes to be consistent with their standards and they were prevented from doing that by the management."

Unable to pass the Consumers Union on-track stability test because the Explorer was rolling over at under 45 miles per hour, Ford resorted to using computer simulations to show the vehicle's safety. Ford claimed the validation data for its computer results did not exist, precluding an expert from determining whether the Explorer actually passed the computer tests. The Explorer did pass the Consumers Union short course test, but that test was designed to measure its handling, not stability.

The Explorer's instability was increased by Ford management's decision to utilize P235 tires that further raised the center of gravity, instead of the P215 tires specified and requested by its engineers to provide greater stability. Based upon his review of Ford internal documents, the Wilsons' expert, Dr. Renfroe, testified that Ford "knew when they made that decision that the vehicle was going to be more unstable and more likely to rollover in an accident avoidance maneuver, and they were . . . willing to accept the risk and take it to court, if necessary." Ford chose larger tires to fill a cosmetic gap between the wheel well and tire in order to present a more "robust" look. Ford's own analysis showed that Explorers equipped with P235 tires would have an SI of 2.08, less than the then-current 1987 Bronco II's SI of 2.15. With the P235 tires, the Explorer failed basic J-turn stability tests.

In 1988 a Firestone engineer, who was working with Ford to analyze the stability effect of different tire sizes on the prototype Explorer, wrote to Ford complaining about the vehicle's inherent instability: "Most importantly, the vehicle still has [two-]wheel lift no matter what tire is on it, 225/70, 215/75 or 205/75. So you're kidding yourself if anyone thinks going back to a base tire of 215/75 is going to solve anything."

Unable to pass stability tests with P235 tires, Ford executives in 1989 considered releasing the four-door

Explorer on P225 tires in order to pass the Consumers Union test. Later, if the Explorer passed the test, Ford could release the vehicles with P235 tires, consistent with its marketing plan. In an internal Ford e-mail, this was referred to as a "strawman" that would "assure good performance in the [Consumers Union] Test and minimize any adverse Public Relations risk." Ford's decision to accept the risk of using the P235 tires is shown in an internal e-mail from Ford employee Roger Stornant to Charles White, a senior design engineer for the Ford Explorer: "OGC [the office of general counsel] is concerned we will be the only OEM [original equipment manufacturer] with a vehicle that has a significant chance of failing the CU [Consumers Union] test. I believe that management is aware of the potential risk w/P235 tires and has accepted risk."

Instead of using smaller tires, Ford executives decided in February 1989 to underinflate the P235 and P245 tires to 26 pounds per square inch (psi), as opposed to the tire's specification of 35 psi. Explorer owners were not informed of the need to underinflate the tires, nor were they told they were exposed to the risk of a rollover by complying with the tire's higher inflation specifications.

Ford had an opportunity to improve the Explorer's stability when it changed its suspension design for the 1995-1998 models. But again financial considerations prevailed and, according to a 1990 internal Ford document, Ford decided "not [to] take advantage of the fact that the engine could be lowered with a[n] SLA[5] type suspension. This decision was driven by early implementation and program cost." As a result, the Wilsons' 1997 Explorer was no more

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5 "SLA" is short for "short/long arm" suspension, also known as "double wishbone" suspension.

stable than the original model or its prototypes. According to the Wilsons' experts, the Explorer's inherent instability caused it to roll in response to Mrs. Wilson's emergency avoidance maneuver, resulting in her injuries.

2. Roof strength defect

As Mrs. Wilson's Explorer rolled, the roof crushed nearly a foot into the passenger compartment. The Wilsons' biomechanical expert, Dr. Anthony Sances, testified that Mrs. Wilson's spinal injury was caused by 1,000 to 2,000 pounds of force crushing down onto her shoulder. Dr. Frank Coufal, her neurosurgeon, confirmed that compressive force caused the spinal injury. The Wilsons' experts testified that a stronger roof would not have crushed and would have prevented Mrs. Wilson's injuries.

The Wilsons presented evidence that rollovers are relatively nonviolent events for the occupants when they are properly restrained and there is minimal roof intrusion, and occupants are killed or disabled only when the roof crushes inward.

The Wilsons also presented testimony from their engineering expert Stephen Forrest as to why the Explorer's roof was defectively weak. The evidence showed that Ford could have provided the Explorer with a roof that would not have crushed by using high strength steel, adding reinforcements, eliminating open sections such as the depressed weld groove, eliminating holes and/or using foam filling. Ford had used safer closed section front headers in other vehicles. These modifications would have cost about $20 per vehicle.

3. Ford and Drew's failure to warn the Wilsons of the defects

The Wilsons testified that Ford and Drew did not provide notice of the Explorer's roof crush risk. The Wilsons also submitted evidence that Drew failed to warn them of the

instability danger posed by inflating the P235 tires to the tire manufacturer's recommended psi. Drew did not disclose that their Explorer was equipped with larger LT235 tires instead of smaller P225 or P215 tires, nor that underinflation was required for the larger tires. The salesmen at Drew were unaware of an underinflation requirement. Although Ford directed its dealers to use no more than 26 psi in P235 tires, Drew never warned the Wilsons of this fact. Because of this, the Wilsons never knew to instruct attendants to underinflate the tires below the specified 35 psi when the vehicle was serviced.

The Wilsons testified they never would have bought the Explorer if the rollover and tire pressure risks had been disclosed.

E. Trial and Jury Verdict

The jury deliberated for five days before reaching a verdict. It found nine to three that the Explorer had a stability design defect which was a substantial factor in causing the Wilsons' injuries. The jury found 11 to one that there was a crashworthiness design defect in the roof and that this defect was also a substantial factor in their injuries.

As to Drew, the jury found 10 to two that it failed to warn the Wilsons of the stability defect. They found in favor of Ford on this count. The jury found 10 to two that both Ford and Drew failed to warn the Wilsons of the Explorer's crashworthiness defect.

The jury awarded Mrs. Wilson $573,348 for past economic loss, $4,032,656 for future economic loss, $6 million for past noneconomic loss and $99 million for future noneconomic loss.

The jury found nine to three that Ford acted with oppression, fraud or malice. The court's poll of the jury confirmed each juror had found fraud, malice or oppression by clear and convincing evidence.

In a separate phase of trial, the parties presented evidence and arguments on punitive damages. During closing argument, counsel for Ford said: "It's impossible not to be angry at Ford, Ford Motor Company, for what decisions that in marketing and selling this Ford Explorer it knowingly put a defective product out on the market [*sic*] and caused the family tragedy that you see before you now. . . . [¶] . . . [¶] . . . We are sorry. I don't think—I know it rings hollow, but I am going to say it anyway. We are sorry. We are sorry that we let you down. The engineers are sorry that they let the rest of the company down."

The jury awarded $246 million in punitive damages.

F. Posttrial Motions and Judgment

Ford filed motions for new trial and judgment notwithstanding the verdict (JNOV).

The JNOV motion attacked the evidence supporting the punitive damages award. The court reexamined the evidence and concluded that the Wilsons had met their burden of producing clear and convincing evidence that Ford acted with malice, a conscious disregard for safety, and engaged in despicable conduct.

Ford's motion for new trial challenged the size of the compensatory and punitive damages award. The court found "the damages awarded are excessive," but also stated, "The Court does not find that the jury rendered its verdict due to passion or prejudice." The court conditionally granted a new trial unless the Wilsons consented to a reduction of Mrs. Wilson's compensatory damages award to $70 million, Mr. Wilson's loss of consortium award to $5 million and the punitive damages award to $75 million. Subtracting the jury's award of economic damages in the amount of $4,606,004, the court's remittitur left Mrs. Wilson with an award of noneconomic damages in the amount of $65,393,996.

In assessing the propriety of the amount of compensatory damages awarded to Mrs. Wilson, the court stated: "The evidence, in the Court's opinion, is insufficient to support a compensatory damage verdict in favor of [Mrs. Wilson] in the amount of $109,606,004. In reaching that finding and the other findings on the verdict on damages, the Court has weighed the evidence, including reasonable inferences therefrom, and is convinced from the entire record the jury clearly should have reached a different verdict on damages. That same evidence, however, . . . is sufficient to support a compensatory damage award in favor of [Mrs. Wilson] in the amount of [$70 million]."

In assessing the proper amount of punitive damages to be awarded the court stated: "In considering these factors, the evidence showed Ford had a pattern of deficient design regarding safety in favor of increased financial returns and was a result of the conscious disregard of Ford executives. That evidence was primarily adduced through Ford's own internal memoranda and correspondence. This conduct was reprehensible and weighs in favor of punitive damages. The remittitur reduces the punitive damage award to a one-to-one ratio relative to the compensatory award. This is well within the second guidepost set forth by the Supreme Court. Even as reduced, the compensatory damage award is large. When compensatory awards are substantial, a ratio of [punitive damages] equal to the compensatory damages is within the limits of the due process guarantee. [Citation.] The punitive damages are fair and reasonable and proportionate to the amount of harm suffered by the [Wilsons]."

The Wilsons accepted the remittitur and an amended judgment was entered on September 3, 2004. Ford's timely appeals followed.

ARGUMENT

I. EVIDENTIARY ISSUES

A. Bronco II Evidence

Ford asserts it is entitled to a new trial because the trial court erroneously admitted evidence regarding the Bronco II vehicle. This contention is unavailing.

1. Background

Ford contends the court erred in denying its motion in limine that sought to exclude as irrelevant "all evidence relating to the Bronco II and Ford's decision to cease manufacture of the Bronco II." In response, the Wilsons submitted evidence that the Explorer's relevant design characteristics were derived from the Bronco II and that Ford had knowledge of the rollover risk posed by that design.

The trial court denied Ford's motion, finding the Explorer's development was "intimately tied" to the Bronco II's development, as shown by Ford's internal documents.

Ford's motion for new trial asserted the court erred by allowing evidence of the Bronco II. The court rejected this argument, finding that the Wilsons "presented substantial evidence of the design carry-over from the Bronco II to the Explorer, evidence of the intermingling of the development and testing of the Bronco II and the Explorer and the similar source of rollover problems between the Bronco II and Explorer for the Court to find the two vehicles are substantially similar."

2. Analysis

"'Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence.' " (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900 [122 Cal. Rptr. 2d 802].) " ' "The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the

trial court of its discretionary power." ' " (*Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1815 [42 Cal. Rptr. 2d 459].)

The court did not abuse its discretion in admitting evidence of similar design flaws in the Bronco II to those alleged to be at fault in the Explorer. The Wilsons' expert, Dr. Renfroe, testified that the Explorer and the Bronco II shared the specific dangerous design characteristics that created instability. In fact, it would have been impossible not to have evidence on the similarities of the Explorer and Bronco II's stability characteristics as Ford itself assessed the stability of the Explorer by comparison to the Bronco II.

Ford asserts that it was error to introduce evidence of the Bronco II because they were different vehicles, citing many differences in design. However, the evidence went to similarities in a particular design flaw, not the vehicles as a whole.

Where a plaintiff intends to adduce evidence of the functioning of related products to prove that the product in question was defective, identical conditions need not be present between the two systems. Substantial similarity is sufficient. (*See Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 403-404 [185 Cal. Rptr. 654, 650 P.2d 1171] (*Hasson*), disapproved on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574 [34 Cal. Rptr. 2d 607, 882 P.2d 298].) Thus, in an action against an automobile manufacturer to recover for damages arising out of an automobile accident caused by brake failure in a 1966 model vehicle, the California Supreme Court held that the trial court had reasonable basis for admitting evidence of numerous failures occurring in 1965 models for the purpose of showing that 1966 models were similarly defective even if plaintiffs did not prove that the 1965 system was exactly the same as the 1966 system. (*Hasson, supra,* 32 Cal.3d at pp. 403-404.)

Ford argues that the Explorer's and Bronco II's stability characteristics were not sufficiently similar to allow the evidence concerning the Bronco II. The trial judge in the first instance must determine if the design characteristics are sufficiently similar. (*Hasson*, *supra*, 32 Cal.3d at p. 404.) As discussed, *ante*, the court found that the Bronco II's and Explorer's relevant design characteristics were substantially similar, and we must give substantial deference to that finding. (See *Bado-Santana v. Ford Motor Co.* (D.P.R. 2005) 364 F. Supp. 2d 79, 92-94 [in rollover case involving Ford Explorer, court denied Ford's motion in limine to exclude evidence of design and development history of Bronco II as too dissimilar to Explorer, finding such evidence relevant to Ford's knowledge of and failure to correct stability design flaws].)

Moreover, "[w]hen evidence is offered to show only that defendant had notice of a dangerous condition, the requirement of similarity of circumstances is relaxed: ' "[A]ll that is required . . . is that the previous injury should be such as to attract the defendant's attention to the dangerous situation." ' " (*Hasson*, *supra*, 32 Cal.3d at p. 404.)

Here, the evidence was relevant to prove that Ford knew it was designing and manufacturing a vehicle with the same stability design defects as the Bronco II. It was also evidence that could establish malice, fraud and oppression necessary for punitive damages. Ford knew that to increase a vehicle's stability, it needed to widen the vehicle's track width and lower the center of gravity. The Wilsons presented evidence that Ford engineers requested such changes in the Explorer's design, but those were rejected. The Explorer's center of gravity, track width and SI were substantially similar to the Bronco II.

The court did not abuse its discretion in admitting evidence concerning the Bronco II's stability problems, as the Explorer's stability characteristics were substantially

similar. The evidence was relevant both to prove the cause of the Explorer's stability defect and to show notice on Ford's part at the time it was designing the Explorer.

B. Exclusion of Ford's Comparative Rollover Statistics

Ford asserts that the court erred by excluding Ford's "real-world safety record and comparative data" relating to Explorer rollover rates. We reject this contention.

1. Background

Ford cites several evidentiary rulings regarding the Explorer's comparative rollover rates that it asserts were erroneous. First, the court ordered stricken from the trial court record testimony offered by Ford that the Explorer "had one of the best rollover rates compared to other SUV's in its class." The court also refused to allow Ford's automotive engineering expert Don Tandy to testify as to whether the Explorer had a higher rollover rate than other SUV's (sport utility vehicles). Ford asserts that the court erred in refusing to allow its statistical expert, William Wecker, Ph.D., to testify that the Explorer had a rollover rate comparable to other SUV's. The court also refused to allow Ford's stability expert Lee Carr to testify concerning accident statistics and rollover rates of other vehicles.

Ford also contends that the court "compounded its errors" by allowing several of the Wilsons' witnesses to testify concerning their involvement in other Explorer rollover cases.

2. Waiver

The Wilsons assert that Ford waived the right to assert error regarding the testimony of its expert Dr. Wecker concerning the Explorer's rollover rate compared to other vehicles. The Wilsons point out that they brought a motion in limine to exclude his opinion, but the court reserved ruling

on his testimony pending a foundational showing by Ford, and thereafter Ford did not attempt to lay a foundation for his testimony.

Ford responds that the court ruled Dr. Wecker's testimony inadmissible in an unreported sidebar conference and that counsel for the Wilsons acknowledged this ruling on the record when it argued against admission of other similar evidence that Ford could not "get in from the Wecker types." Ford also asserts that it objected on several occasions more generally that it should have been allowed to present evidence of the Explorer's safety record as compared to other vehicles.

We conclude that there was no waiver. First, a review of the trial transcript indicates that counsel for the Wilsons did acknowledge on the record that Dr. Wecker's testimony was previously excluded by the court. Moreover, " '[w]here an entire class of evidence has been declared inadmissible or the trial court has clearly intimated it will receive no evidence of a particular class or upon a particular issue, an offer of proof is not a prerequisite to raising the question on appeal . . . .' [Citation.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) P 8:275.6, p. 8-154.)

3. Analysis

Ford asserts that expert testimony concerning the Explorer's comparative rollover rate was admissible to demonstrate that the Explorer "is a reasonably safe vehicle that is not unusually prone to roll over in comparison to other vehicles." However, such evidence was irrelevant and inadmissible.

A manufacturer cannot defend a product liability action with evidence it met its industry's customs or standards on safety. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal. App. 3d 757, 803 [174 Cal. Rptr. 348] (*Grimshaw*); *Foglio v.*

Western Auto Supply (1976) 56 Cal. App. 3d 470, 477 [128 Cal. Rptr. 545].) In fact, admission of such evidence is reversible error. (*Heap v. General Motors Corp.* (1977) 66 Cal. App. 3d 824, 831 [136 Cal. Rptr. 304].) This is because in strict liability actions, "the issue is not whether defendant exercised reasonable care." (*Foglio*, *supra*, 56 Cal. App. 3d at p. 477.) Rather, the issue is whether the product fails to perform as the ordinary consumer would expect. (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 435 [143 Cal. Rptr. 225, 573 P.2d 443] (*Barker*).)

In *Grimshaw*, *supra*, 119 Cal. App. 3d 757, the defect at issue was the Ford Pinto's gas tank. Ford requested that the court instruct the jury that, in considering whether the gas tank was defective, it was to consider " 'the extent to which its (Pinto's) design and manufacture matched the average quality of other automobiles and the extent to which its design and manufacture deviated from the norm for automobiles designed and manufactured at the same point in time.' " (*Id.* at p. 803.) The Court of Appeal held that the trial court properly refused the instruction as improper evidence of industry custom or practice. (*Ibid.*)

Thus, the court properly excluded evidence whereby Ford sought to prove that the Explorer's rollover rate was comparable to other vehicles on the road. That was evidence that improperly sought to show that it met industry standards or custom for rollovers.

Ford asserts that the comparative rollover rate was relevant to the "risk/benefit" analysis that must be considered in determining if a product is defective, citing *Barker*, *supra*, 20 Cal.3d 413. However, as explained in *Grimshaw*, the *Barker* risk/benefit analysis does not allow admission of such evidence: "The *Barker* court's enumeration of factors which may be considered under the risk-benefit test not only fails to mention custom or usage in the industry, the court otherwise makes clear by implication that they are inappropriate

considerations." (*Grimshaw*, *supra*, 119 Cal. App. 3d at p. 803.)

Ford also contends that the comparative rollover evidence was relevant to prove it did not act with oppression, fraud or malice and therefore was admissible to rebut the Wilsons' claim for punitive damages. However, as will be discussed in more detail, post, the Court of Appeal in *Grimshaw*, *supra*, 119 Cal. App. 3d 757 held that compliance with industry standards or custom was irrelevant not only to the issue of defect, but also to punitive damages. (*Id.* at pp. 792, 803, 807-822.) Indeed, counsel for Ford acknowledged at trial that the Wilsons' punitive damages allegations did not change *Grimshaw's* prohibition on industry custom and practice evidence.

Even if the comparative rollover data were not inadmissible as a matter of law as improper industry and custom evidence, it would still be inadmissible as unreliable and misleading. Ford's statistics from which the comparable rollover rate testimony would flow were drawn from two databases, FARS (Fatality Analysis Reporting System), and a state database tracking state accident information. FARS only included fatal rollover accidents and did not compare the relative stability of vehicles; included all vehicle types, not just SUV's; and did not track the cause of rollovers or the resulting injuries. The state database encompassed accidents from only 10 states, did not include the two most populous states, California and Texas, and did not detail causes of the rollovers.

In Ford's offer of proof for its expert Carr, it admitted his testimony was going to compare the Explorer's rollover performance to a variety of dissimilar vehicles, including Greyhound buses and passenger cars. The court excluded only that portion of his testimony. Carr opined that the Explorer's design did not contribute to the rollover. Rather, according to Carr, the Explorer rolled because Mrs. Wilson

steered it onto the dirt shoulder, which, because of the loose soil and uneven terrain, would make any vehicle, not just the Explorer, susceptible to rolling over. Carr also testified that the Explorer complied with stability guidelines related to steering. Over the Wilsons' objection, Carr was allowed to show a video of the rollover response of a 1992 Chevrolet van to challenge the testing methodology used by the Wilsons' expert Dr. Renfroe. Over the Wilsons' objection he was also allowed to testify concerning the number of rollovers of various vehicles around the country. According to Carr, the vast majority of rollovers for all types of vehicles happened off the paved surface of the road.

Further, while the court excluded evidence of the Explorer's comparative safety, accident or injury rates, it did not exclude the Explorer's own "real world safety record." Indeed, Ford never proffered such evidence at trial.

The court did not abuse its discretion by excluding Ford's proffered evidence on comparative rollover rates.

The court also did not "compound its errors" by allowing several of the Wilsons' witnesses to testify as to their involvement in other Explorer rollover cases. Ford did not object to this testimony as improper. The only objection to this testimony overruled by the court was "asked and answered."

II. NONECONOMIC DAMAGES

Ford asserts that the noneconomic damages award, a remitted by the court, of approximately $65 million to Mrs. Wilson, and the $5 million award to Mr. Wilson, as remitted by the court, are excessive as a matter of law, are the result of passion and prejudice, are extreme when viewed against awards that have been upheld in comparable cases, and violate its due process rights. Amicus curiae AAM also asserts that the award violates due process principles. We conclude that the noneconomic damage award to

Mrs. Wilson is excessive, the result of passion or prejudice, and that the substantial evidence in this case supports an award of $18 million. We also conclude, however, that Mrs. Wilson's award did not violate due process principles. We conclude that the award to Mr. Wilson of $5 million in damages for loss of consortium is reasonable and we affirm that award.

A. Size of the Award

1. Standard of review

"The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently, as in this case, see the injury and the impairment that has resulted therefrom. . . . The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506-507 [15 Cal. Rptr. 161, 364 P.2d 337] (*Seffert*).)

"The reviewing court does not act de novo, however. As we have observed, the trial court's determination of whether damages were excessive 'is entitled to great weight' because it is bound by the 'more demanding test of weighing conflicting evidence than our standard of review under the substantial evidence rule . . . .' [Citation.] All presumptions favor the trial court's determination [citation], and we review the record in the light most favorable to the judgment [citation]." (*Fortman v. Hemco, Inc.* (1989) 211 Cal. App. 3d 241, 259 [259 Cal. Rptr. 311].)

Further, " 'where the trial court has required a remission as a condition to denying a new trial "a verdict is reviewed

on appeal as if it had been returned in the first instance by the jury in the reduced amount." [Citations.]' [Citation.]" (*West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal. App. 3d 831, 877 [220 Cal. Rptr. 437] (*West*).)

2. Analysis

In reviewing a noneconomic damage award "[t]here are no fixed or absolute standards by which an appellate court can measure in monetary terms the extent of the damages suffered by a plaintiff as a result of the wrongful act of the defendant. The duty of an appellate court is to uphold the jury and trial judge whenever possible. [Citation.] The amount to be awarded is 'a matter on which there legitimately may be a wide difference of opinion'[citation]. In considering the contention that the damages are excessive the appellate court must determine every conflict in the evidence in respondent's favor, and must give him the benefit of every inference reasonably to be drawn from the record [citation]. [¶] While the appellate court should consider the amounts awarded in prior cases for similar injuries, obviously, each case must be decided on its own facts and circumstances. Such examination demonstrates that such awards vary greatly. [Citations.] Injuries are seldom identical and the amount of pain and suffering involved in similar physical injuries varies widely. These factors must be considered." (*Seffert, supra*, 56 Cal.2d at p. 508.)

Further, "[t]he fact that an award may set a precedent by its size does not in and of itself render it suspect. The determination of the jury can only be assessed by examination of the particular circumstances involved." (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal. App. 3d 626, 654-655 [151 Cal. Rptr. 399].)

"An appellate court should not assume to substitute its appraisal, for that of a jury, of the amount of damages for physical pain and mental suffering sustained by a party in a case where trial by jury was had as a matter of right

[citation], but in a case where it appears that a verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment [citations] the appellate court may reverse the judgment and remand the case for a new trial either on all the issues or on the issue of damages alone [citations], or it may, in the interests of justice and with the consent of the party against whom the modification is made, modify the judgment as to the amount of damages, and affirm it as modified [citations]." (*Deevy v. Tassi* (1942) 21 Cal.2d 109, 120-121 [130 P.2d 389]; see also *Hunton v. California Portland etc. Co.* (1944) 64 Cal. App. 2d 876, 882-885 [149 P.2d 471] [trial court, on a motion for new trial, found compensatory damages award excessive and reduced a jury verdict of $40,000 to $18,000; on appeal the appellate court, finding the award still excessive, reduced the damages to $10,000].)

Ford characterizes the jury's award to the Wilsons of $118 million in noneconomic damages ($105 million to Mrs. Wilson + $13 million to Mr. Wilson) and the court-reduced award of approximately $70 million (approximately $65 million to Mrs. Wilson + $5 million to Mr. Wilson) as "irrational, punitive, and the clear product of passion and prejudice" and asserts that the evidence "does not come close to supporting this unprecedented award."[6] We conclude that although Mrs. Wilson's injuries were catastrophic, analyzing

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6 In making this assertion, Ford neglects to discuss the evidence in support of the Wilsons' damages at all, much less in the light most favorable to the judgment. This failure in itself would allow this court to disregard Ford's arguments concerning damages. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [19 Cal. Rptr. 3d 416].) Nevertheless, we elect to consider Ford's contention on the merits.

all appropriate factors, reviewing the trial court record, and using our collective experience, we must reduce the noneconomic damage award as excessive and the product of passion and prejudice. We also conclude that the loss of consortium award to Mr. Wilson is reasonable and affirm that award. Because Ford focuses its discussion almost exclusively on the award to Mrs. Wilson, our analysis likewise focuses on whether that award was excessive.[7]

a. Nature of Mrs. Wilson's injuries

A review of the evidence shows the substantial nature of the Wilsons' noneconomic injuries. Mrs. Wilson, a once vibrant and energetic wife and mother is now a paraplegic, who is in constant and debilitating pain, has lost all control over her bladder and bowel movements, and now requires constant care from her husband. She is disfigured and subject to ailments associated with her injuries that could worsen her injuries or shorten her life span. Mr. Wilson has lost his role as a husband and is now reduced to being a constant caregiver.

Noneconomic damages do not consist of only emotional distress and pain and suffering. They also consist of such items as invasion of a person's bodily integrity (*i.e.*, the fact of the injury itself), disfigurement, disability, impaired

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[7] We also note, as discussed, ante, that we do not review whether the jury's original award of $118 million to the Wilsons "shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (*Seffert*, *supra*, 56 Cal.2d at pp. 506-507.) Rather, since the court remitted the award to $70 million as a condition of denying Ford's motion for new trial, we review the noneconomic damage award " ' "as if it had been returned in the first instance by the jury in the reduced amount." [Citations.]' [Citation.]" (*West*, *supra*, 174 Cal. App. 3d at p. 877.)

enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy. (Judicial Council of Cal. Civ. Jury Instns. (2003-2004), CACI No. 3905A.)

In this case, the noneconomic damages suffered by Mrs. Wilson were substantial, permanent, and support a significant award. However, the reduced award of approximately $65 million is, even given the severity of her injuries, disproportionate to those injuries so as to "raise a strong presumption that it is based on prejudice or passion." (*Saari v. Jongordon Corp.* (1992) 5 Cal.App.4th 797, 807 [7 Cal. Rptr. 2d 82].)

b. Amount of award vs. projected life span

We also consider the amount of the damage award in connection with Mrs. Wilson's projected life span of 35 years.[8] The damage award, as reduced by the court, still amounts to approximately $1,868,399 per year over her projected life span, an extremely high amount. Ford on the other hand argues an award of $1 million is reasonable, which would work out to $28,571 per year, and only $78 per day. While we believe that the award as reduced by the trial court is still excessive, we also do not believe that Ford's suggested award fairly and justly compensates Mrs. Wilson.

c. Comparison with other awards

In support of its position that the noneconomic damage award is excessive as a matter of law, Ford attempts to compare the award to published California decisions that have upheld damage awards on similar facts. The Wilsons,

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[8] Mrs. Wilson's projected life span at the time of trial was 33 years. However, we use 35 years here because the award of noneconomic damages included an award for approximately two years of past general damages.

on the other hand, argue that it is not appropriate to compare the award here to other cases, that we must review it only by looking at the particular facts of this case. We conclude that while it is appropriate to look at awards in similar cases, ultimately we must determine the propriety of the award based upon the facts of this case.

In *Seffert*, *supra*, 56 Cal.2d at page 508, the California Supreme Court stated, "While the appellate court *should consider the amounts awarded in prior cases for similar injuries*, obviously, each case must be decided on its own facts and circumstances. Such examination demonstrates that such awards vary greatly. [Citations.] Injuries are seldom identical and the amount of pain and suffering involved in similar physical injuries varies widely." (Italics added.) More recently, the California Supreme Court made the following statements in a footnote: "Defendants have compiled a lengthy list of judgments awarding damages which have been reversed on appeal as excessive. Those cases do not, *in and of themselves*, mandate a reversal here. The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding. [Citations.] Thus, we adhere to the previously announced and historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice on the part of the jurors." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65, fn. 12 [118 Cal. Rptr. 184, 529 P.2d 608] (Bertero), italics added.)

The Wilsons assert that Bertero stands for the proposition that Courts of Appeal should not compare the damages in other similar cases at all in reviewing a claim that an award is excessive. However, we do not read Bertero so broadly. Its criticism of comparing damage awards from other cases was limited to the statement that judgments awarding damages in other cases "do not, *in and of themselves*, mandate a reversal." (*Bertero*, *supra*, 13 Cal.3d at p. 65, fn. 12, italics added.) In the quoted footnote the *Bertero* court cited the earlier Seffert court as support for its conclusion. (*Bertero*, *supra*, at p. 65, fn. 12.) Therefore, we conclude that a verdict may not be held to be excessive as a matter of law simply because it exceeds the amount awarded in other cases. Courts of Appeal must make their decisions based on the evidence in the case being reviewed. However, evidence of other verdicts is still relevant as a point of reference, to provide context to the award by establishing a range of values for similar injuries.

Ford cites five reported California decisions where noneconomic damages for purportedly similar injuries ranged from $1 million to $8.4 million. (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287 [96 Cal. Rptr. 2d 605] [50-year-old plaintiff—award of $1 million]; *Niles v. City of San Rafael* (1974) 42 Cal. App. 3d 230 [116 Cal. Rptr. 733] [child suffered paralysis from head trauma—award of $1,604,371]; *Rosh v. Cave Imaging Systems, Inc.* (1994) *26 Cal.App.4th 1225* [32 Cal. Rptr. 2d 136] [the plaintiff rendered paraplegic from gunshot—award of $2.99 million]; *Fortman v. Hemco, Inc.* (1989) 211 Cal. App. 3d 241 [259 Cal. Rptr. 311] [three-year-old girl rendered paraplegic from fall from car—$6 million award]; *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516 [117 Cal. Rptr. 2d 220, 41 P.3d 46] [the plaintiff rendered paraplegic after his truck rolled—$8.4 million award].)

However, the cited cases are of only small assistance. Of the five California cases cited by Ford, in only two were the damages claimed to be excessive, and in both cases the damages awards were upheld. (*Niles v. City of San Rafael*, *supra*, 42 Cal.App.3d at p. 244; *Fortman v. Hemco, Inc.*, *supra*, 211 Cal. App. 3d at p. 261.) In the case with the largest noneconomic damage award, the size of the award was not challenged on appeal. (*Hess v. Ford Motor Co.*, *supra*, 27 Cal.4th at p. 520.) Ford cites no published California decisions involving same or similar injuries where a noneconomic damage award was reversed as excessive.

The Wilsons on the other hand cite an unpublished California decision that involved an award of $38 million in combined economic and noneconomic damages, reduced by 50 percent due to the plaintiff's comparative fault, to a quadriplegic who was 53 years old, and an award to his wife of $13 million for loss of consortium, which the Court of Appeal upheld. The Wilsons also cite a published decision by an appellate court in Indiana that upheld an award of $55 million in combined economic, noneconomic, and loss of consortium damages, already reduced by a finding that the plaintiff was 20 percent at fault, making the total award $66 million. (*Ritter v. Stanton* (Ind.Ct.App. 2001) 745 N.E.2d 828, 833, 857.)

A review of all of these cases shows a range between $1 million and $66 million in compensatory damages awards and substantial differences in the facts of each case. This demonstrates that while a comparison of other cases may give us a point of reference, ultimately our decision must be based upon the evidence in this case.

d. Evidence in record that jury acted out of passion or prejudice

Perhaps the most important factor that we must consider in determining if the award of noneconomic damages is excessive, other than the amount of the award, is whether

there is evidence in the record to support defendants' claim that the jury acted out of passion or prejudice. In this case we have substantial evidence in the record that demonstrates the jury's award was the product of such improper emotions and therefore must be reduced.

In discussing economic damages in closing argument, counsel for the Wilsons argued that Mrs. Wilson suffered "an economic loss of $4.6 million dollars . . ., based on the evidence that came before you." The jury awarded Mrs. Wilson what counsel asked for. The reasonableness of this amount for economic damages is not in dispute on appeal.

In discussing noneconomic damages in his closing argument, counsel for the Wilsons described some of the matters that could be included in such an award. This included past and future physical pain, mental suffering, and loss of enjoyment of life. Counsel then suggested a method for calculating these numbers, taking into account the past injury, as well as future injuries over her 33-year life expectancy. Following that discussion, counsel made the following statement: "I respectfully submit that if you look at the catastrophic injury that we have, the numbers there, they are probably three to four times the specials is what you are going to find. It's going to be fair, just and reasonable. And this is an awful lot of money. I know it is. It's a lot of money. But when someone says it's a lot of money, why are we doing this, you tell them it's a lot of pain. It's a loss of a human being's dignity and worth. . . . And I submit to you that there is no higher value than a good woman who is a good wife, a good mother, a good neighbor, that is out there helping others. And I can't put the number on it, but I want you to be reasonable, just and fair, recognizing the humanity of this issue." (Italics added.) Thus, counsel was requesting the jury award noneconomic damages to Mrs. Wilson in an

amount three to four times the amount they awarded in economic damages, or $13.8 to $18.4 million.

As to Mr. Wilson's loss of consortium claim, counsel argued that "it's probably going to be equated perhaps reasonably just to what the economic loss is for his noneconomic loss." Counsel was thus requesting that the jury award Mr. Wilson $4.6 million for his loss of consortium claim.

Next, addressing all the compensatory damages, the Wilsons' counsel stated the following: "I invite defense counsel to address my discussion of damages. If he does not discuss damages in his closing, if he does not disagree with me, you can accept these numbers as reasonable and just and fair." (Italics added.)

Defense counsel did not address the issue of damages in closing argument.

When we compare these numbers to the amount the jury awarded, it is apparent that the jury disregarded the Wilsons' counsel's own statements as to what was a reasonable amount to award in this case. On noneconomic damages to Mrs. Wilson, the jury awarded $105 million, or approximately 13 times the amount counsel requested and stated was "fair, just and reasonable." The reduced award of approximately $65 million is still approximately three to five times that amount. This provides compelling evidence that the jury rejected what even the Wilsons' counsel believed was fair and reasonable, and acted out of passion or prejudice.

The jury's award of loss of consortium damages also supports this conclusion. The jury awarded Mr. Wilson $13 million for his loss of consortium claim, or almost three times what the Wilsons' counsel requested.

The jury's complete rejection of the damages suggested by the Wilsons' counsel, a range for noneconomic damages

and an amount for loss of consortium that counsel characterized as fair, reasonable and just, is compelling evidence the jury acted out of passion or prejudice. The fact that the jury's award, and the award as remitted by the court, far exceeded, and had no relation to, the amounts requested by counsel suggests that the jury was not acting as a fair and neutral trier of fact.

There was also a question posed by Ford's counsel that, in light of Mrs. Wilson's catastrophic injuries, may well have inflamed the passions of the jury significantly enough to result in the excessive damage award. Ford's trial counsel, in its last question on cross-examination of Mr. Wilson, posited the following:

"[Q] The silver lining, to the extent that there could be one, it has brought you and [Mrs. Wilson] and the family closer together? [¶] . . .

"[A] I think where we were together before, we are together after. I don't think it's done more for us. I think it's—I don't think it's a benefit or a plus in any way. I am sorry, I don't think I can see it that way."

This question implied that the family should find a silver lining in what befell Mrs. Wilson. It may very well have been viewed as callous by the jury and might explain, in some manner, the actions of the jury in rendering a verdict so out of line with the amounts requested by the Wilsons' own counsel.

e. Our review of the record

In addition to considering the above factors, we have reviewed the record to determine whether the award, as remitted by the court, is excessive. This includes reviewing the nature and extent of Mrs. Wilson's injuries, the testimony of lay and expert witnesses on damages, and the damage award. Our own review of the record reveals that the

noneconomic damage award was excessive and was the product of passion or prejudice.

f. Conclusion

Based upon all of the above factors, and utilizing our collective experience, we conclude that the award of noneconomic damages to Mrs. Wilson, even as remitted by the court, was excessive and that the facts of this case instead support an award of $18 million, within the ratio/range requested by the Wilsons' counsel. As we have discussed, *ante*, the award, even as reduced by the trial court, far exceeds the amount suggested as reasonable, fair and just by the Wilsons' attorney to the jury. That is compelling evidence that the jury acted out of "passion and prejudice" in awarding noneconomic damages. Further, although each case must be analyzed on its own facts, the award far exceeds any award we could locate that was upheld by a California appellate court.

However, the reduction to $18 million in noneconomic damages is in the range of one recent unreported decision in California where the award of such damages was upheld on appeal. Moreover, utilizing our collective experience, we conclude that an award of $18 million in noneconomic damages is proportionate to Mrs. Wilson's substantial injuries, and is proportionate to the economic damages award. Considering the substantial nature of Mrs. Wilson's injuries, we conclude that $18 million is a just and reasonable amount, an amount " 'a reasonable person would estimate as fair compensation' " *under the circumstances of this case. (Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1665 [28 Cal. Rptr. 2d 88].)

Ford asserts briefly that the remitted award of $5 million for loss of consortium to Mr. Wilson was also excessive, citing cases with loss of consortium awards of $229,000 to $2.55 million. However, utilizing the same factors we considered above, and noting the devastating impact on

Mr. Wilson's life that Ford's conduct has caused, we do not find the remitted award for loss of consortium to be excessive or the product of passion or prejudice. The amount to which the court reduced these damages approximates the amount suggested by the Wilsons' counsel.

Moreover, to avoid further delay and expense to the parties, and because the record in this matter is sufficiently definite to determine the proper amount of noneconomic damages, we will remit the award of noneconomic damages to $18 million for Mrs. Wilson, conditioned on her acceptance of this reduced amount. If Mrs. Wilson does not agree to the reduced amount, the matter will be reversed and remanded for a new trial on the issue of noneconomic damages, as specified in California Rules of Court, rule 24(d).[9]

B. Due Process Considerations

Ford also asserts that the noneconomic damages award is "unconstitutionally excessive as a matter of federal due process." Amicus curiae AAM makes the same argument, asserting that due process considerations applicable to punitive damages awards should also apply to compensatory damages. This contention is unavailing.

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[9] Ford asserts that if the noneconomic damages award to Mrs. Wilson is determined to be the product of passion or prejudice, we are required, as a matter of law, to grant a new trial on all issues. However, case authority demonstrates it is appropriate to issue a remittitur under such circumstances. (*See Deevy v. Tassi*, *supra*, 21 Cal.2d at pp. 120-121; *Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 586-589 [81 P.2d 894]; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1255-1256 [1 Cal.Rptr.2d 301]; *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1011-1012 [193 Cal.Rptr. 206].)

Ford and AAM ignore the fact that while the United States Supreme Court has in several recent decisions held that due process rights limit the amount of punitive damages that may be imposed upon an individual, a basic underpinning of those decisions was the very distinction between compensatory damages, which are designed to compensate the plaintiff, and punitive damages, which are in the nature of fines or sanctions, designed to punish and deter a defendant. For example, in *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416 [155 L. Ed. 2d 585, 123 S. Ct. 1513] (*State Farm*), the majority opinion began its analysis by making just this distinction: "[I]n our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. [Citation.] Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.' [Citations.] By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution." After establishing this important distinction, the high court concluded that the "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." (*State Farm*, *supra*, 538 U.S. at p. 416, italics added.) The court likened punitive damages to criminal penalties, imposed without the protections of a criminal trial: "Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." (*Id.* at p. 417.)

Ford and AAM cite no authority that constitutional due process limitations applicable to punitive damages awards, as recently confirmed by the United States Supreme Court (see *State Farm*, *supra*, 538 U.S. at p. 412), also apply to compensatory damages awards. Nevertheless, AAM asserts that the rule applicable to punitive damages awards should be

extended to noneconomic damage awards because (1) defendants need notice of their potential exposure to such liability that is imposed in a vague and standardless manner; and (2) the lack of concrete standards for such awards enables juries to pursue punitive goals in rendering such awards.

However, because noneconomic damages are not a punishment that serves to deter conduct, but rather compensation to make a plaintiff whole as a result of a defendant's conduct, uncertainty in the proof does not preclude their recovery: "[O]nce the cause and existence of damages have been . . . established [with reasonable certainty], recovery will not be denied because the damages are difficult of ascertainment. . . . The law only requires that the best evidence be adduced of which the nature of the case is capable, and the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision." (*Dallman Co. v. Southern Heater Co.* (1968) 262 Cal. App. 2d 582, 594 [68 Cal. Rptr. 873]; see also *Speegle v. Bd. of Fire Underwriters* (1946) 29 Cal.2d 34, 46 [172 P.2d 867] [" 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty [in fixing the amount of damages] which his wrong has created' "].)

As the United States Supreme Court has noted, " '[T]he common law rule as it existed at the time of the adoption of the Constitution' was that 'in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.' [Citation.]" (*Feltner v. Columbia Pictures Television, Inc.* (1998) 523 U.S. 340, 353 [140 L. Ed. 2d 438, 118 S. Ct. 1279]; see also *Barry v. Edmunds* (1886) 116 U.S. 550, 565 [29 L. Ed. 729, 6 S. Ct. 501] ["nothing is better settled than [the principle] that, in . . . actions for torts where

no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict"].) Thus, we are loath to usurp this core function of the jury by relying on mathematical formulas to assess the amount of damages that may be awarded, simply because noneconomic damages are not readily quantifiable.

Nor does the imagined danger that vague standards for imposing or reviewing noneconomic damage awards will lead to juries using such awards as punishment as opposed to compensation justify imposing due process limitations on such awards. The jury was instructed that they "must not let bias, sympathy, prejudice, or public opinion influence [their] decision." Although the jury was instructed that as to noneconomic damages "[n]o fixed standard exists for deciding the amount of these damages," they were also instructed that they "must use [their] judgment to decide a reasonable amount based on the evidence and [their] common sense." The jury was instructed that for future economic damages, "[Mrs.] Wilson must prove that she is reasonably certain to suffer that harm." The court, in instructing the jury on noneconomic damages, also delineated the type of harm for which Mrs. Wilson could recover: "Noneconomic damages may consist of the following: [¶] Past and future physical pain, past and future mental suffering, past and future enjoyment of life, past and future disfigurement, past and future physical impairment, past and future inconvenience, past and future grief, past and future anxiety, past and future humiliation, past and future emotional distress."

Thus, under these instructions juries are given guidance as to the proper matters they may consider in making an award of noneconomic damages. These guideposts protect against the purported danger that juries might use such an award to punish a defendant.

Moreover, to the extent that a jury's award of noneconomic damages is challenged as excessive, the judge, sitting as a 13th juror, then will review the evidence to determine if the award should be remitted. The trial judge is not limited to setting aside an excessive damage award where there is evidence the jury acted out of passion or prejudice. Rather, " 'it is within the sound discretion of the trial court in ruling on a motion for a new trial on the ground of excessive damages, to grant the same when there is a substantial conflict in the evidence regarding the extent of the damage.'" (*Hughes v. Hearst Publications, Inc.* (1947) 79 Cal. App. 2d 703, 705 [180 P.2d 419].) This gives the defendants a further check against excessive awards of noneconomic damages.

Finally, the standard under which appellate courts review such awards, that awards will be reversed if they are the product of "passion or prejudice," also serves to protect against such results. It is true that recent cases have stated that awards for emotional distress can in some instances have a punitive element. (*Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 223 [40 Cal. Rptr. 3d 92]; *State Farm*, *supra*, 538 U.S. at p. 426.) However, by reducing the award to Mrs. Wilson for noneconomic damages to $18 million, an amount proportionate to her injuries and economic loss, we have removed that portion of the award that was the product of "passion or prejudice," and no punitive element remains.

AAM relies heavily upon a law review article for its position that the vague standards for quantifying noneconomic damage awards justifies imposing federal due process constraints on such awards. However, the author of that article concluded that the solution to such unchecked awards is limits or standards imposed by legislatures, not application of due process notions to compensatory awards. (Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System* (2004) 90 Va. L.Rev. 1401, 1414, 1417-1418.)

Ford and AAM cite one out-of-state authority that states in a footnote that "[a] grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled 'punitive.' " (*Gilbert v. DaimlerChrysler Corp.* (2004) 470 Mich. 749 [685 N.W.2d 391, 400, fn. 22].) However, that court expressly declined to address this constitutional issue and therefore it is not authority for the proposition cited. (*Ibid.* ["there is no need to reach this constitutional question"].)

We conclude that it is not necessary to impose federal due process principles to limit noneconomic damage awards because (1) the Supreme Court in *State Farm*, *supra*, 538 U.S. 408 imposed due process limits on punitive damages awards because they are similar to criminal penalties, without the protections afforded the defendants in criminal proceedings, and noneconomic damages are designed to compensate, not punish, a defendant; (2) the defendants have adequate notice of potential awards; and (3) the review accorded damage awards by trial and appellate courts ensures that there is no punitive element in noneconomic damage awards.

III. PUNITIVE DAMAGES

Ford asserts that the punitive damages award must be reversed because (1) the Wilsons only proved that reasonable people could disagree regarding the design decisions made by Ford; (2) it complied with all applicable governmental standards; (3) it was improper to admit evidence of Ford's overall financial condition; and (4) the award is excessive under federal and California law. *Amicus curiae* PLAC argues in support of Ford's first contention, and amicus curiae the Chamber argues in support of the second. We conclude that the punitive damages award, as remitted, is excessive and reduce it to $55 million. We reject the remainder of Ford's and *amici curiae's* contentions.

A. The "Reasonable People Can Disagree" Argument

1. Standard of Review

We review an award of punitive damages to see if there is substantial evidence that supports a finding by clear and convincing evidence that a defendant acted with fraud, malice or oppression. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 606 [92 Cal. Rptr. 2d 897].)

2. Analysis

In this case the Wilsons presented evidence, which the jury accepted, that Ford knew of dangerous instability defects in the Explorer. Ford's own testing showed that it was unstable and prone to rollover on flat dry pavement at less than highway speeds. Ford knew before the Explorer was released for sale that the same instability characteristics led to serious injuries to Bronco II drivers. The Wilsons presented evidence that Ford knew that the Explorer's roof was weak and that roof crush caused injury during rollover accidents. Ford had the technology to make the Explorer stable and strengthen the roof, but did not use it. The modifications to strengthen the roof would have cost approximately $20 per vehicle. This evidence constitutes substantial evidence to support the jury's decision to award punitive damages.

Ford asserts, however, that because there was a "reasonable disagreement" among experts concerning the propriety of its design decisions it cannot, as a matter of law, be subject to punitive damages. We reject this contention.

The Wilsons presented expert testimony concerning the design and safety issues on the Explorer. Ford presented contrary expert testimony. The jury rejected the testimony of Ford's experts, as it was entitled to do, that its design decisions were proper and reasonable. Ford's assertion that punitive damages are not allowed unless all experts agree there were improper design decisions is unavailing. If such an assertion were true, punitive damages would never be

allowed in cases where the defendant simply had an expert that disagreed with the plaintiff's expert.

Moreover, the California cases cited by Ford to support this contention do not support its position. They were cases where there was simply a failure of proof to support a punitive damages award (*See Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 996-997 [4 Cal. Rptr. 2d 837, 824 P.2d 643]; *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 348 & 350, fn. 10 [108 Cal. Rptr. 2d 776]; *Mason v. Mercury Cas. Co.* (1976) 64 Cal. App. 3d 471, 474-475 [134 Cal. Rptr. 545]; *Stewart v. Truck Ins. Exchange* (1993) *17* Cal.App.4th 468, 483-484 [21 Cal. Rptr. 2d 338]; *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 184-185 [28 Cal. Rptr. 2d 371].)

Ford also asserts that there was no evidence that any of Ford's decision makers believed the Explorer's design presented an unreasonable risk of injury, presenting the jury with only the "bare and illogical 'inference' that unnamed Ford officials 'must have' acted with malice . . . ." However, the Wilsons presented direct and substantial evidence of Ford management's recognition of the safety implications of their design decisions. As discussed in detail in the factual background, *ante*, there is substantial evidence that Ford decision makers knew how to make the Explorer less dangerous, but chose not to because of financial considerations. Ford's "reasonable people can disagree" argument is unavailing.

PLAC supports Ford's arguments regarding disagreements among experts as a defense to punitive damages, asserting that where there are contemporaneous disagreements among experts regarding design decisions, punitive damages should be barred. However, PLAC cites no California authority for such a proposition. The California case law PLAC cites involves the well-established rule in

insurance bad faith cases that an insurer cannot be liable for bad faith if there is an objectively reasonable dispute about coverage. (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co., supra*, 90 Cal.App. 4th at pp. 347-348; *Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282, 1293 [97 Cal. Rptr. 2d 386].) However, these cases state a substantive standard of liability for insurance claims and do not address when it is proper to impose punitive damages. Notably, PLAC has cited no California product liability case that holds that expert disputes concerning design provide a defense to punitive damage liability or, for that matter, liability in its entirety.

In a footnote, PLAC also cites several out-of-state cases for the proposition that a contemporaneous disagreement among experts bars liability for punitive damages. However, several of the cases cited by PLAC simply do not state such a proposition. Rather, some stand for the proposition that expert disagreement is merely one factor that could be considered in assessing the propriety of punitive damages awards. (*Loitz v. Remington Arms Co, Inc.* (1990) 138 Ill. 2d 404 [563 N.E.2d 397, 406-407, 150 Ill. Dec. 510]; *Owens-Corning Fiberglas Corp. v. Garrett* (1996) 343 Md. 500 [682 A.2d 1143, 1158-1168]; *Satcher v. Honda Motor Co.* (5th Cir. 1995) 52 F.3d 1311, 1316-1317.)

PLAC does cite two cases from Iowa that held a reasonable disagreement among experts about the adequacy of design was a defense in those cases to punitive damages. (*Mercer v. Pittway Corp.* (Iowa 2000) 616 N.W.2d 602, 618; *Hillrichs v. Avco Corp.* (Iowa 1994) 514 N.W.2d 94, 100.) However, no case from any other state has cited these cases with approval, and we could not locate any other state that follows this "rule." Because these cases apply Iowa law, we are not bound by their holdings and decline to adopt such a rule in California.

PLAC also argues that punitive damages should be barred where there was a contemporaneous expert opinion that a product design that caused a plaintiff injury was necessary to avoid greater injuries of other kinds. This contention is unavailing.

First, this argument by PLAC focuses only on Ford's decisions regarding the Explorer's stability. There is no assertion that Ford allowed the roof defect to exist because changing the design would create a greater risk of other injuries. Because the roof's crashworthiness provided an independent basis for the award of punitive damages, this argument fails.

Further, PLAC cites to no evidence in the record to suggest that any member of Ford rejected changes to the Explorer's stability design because to do so would create a greater risk of injury in another manner. Rather, it only cites to statements made in Ford's brief that imply such a rationale, but Ford's statements are not supported by the cited record.

Ford and PLAC's "reasonable people can disagree" argument is unavailing.

B. Compliance with Government Standards

Ford and amicus curiae the Chamber assert that Ford is not subject to punitive damages as a matter of law because it complied with all applicable governmental regulatory standards. In particular, Ford asserts that it complied with FMVSS (Federal Motor Vehicle Safety Standard) 216, which sets the standard for how crush resistant an automobile roof must be. Ford also asserts that it complied with a National Highway Traffic Safety Administration (NHTSA) regulation requiring all SUV's to display a warning concerning the risk of rollovers. (*See* 49 Fed.Reg. 20016 (May 11, 1984).) However, Ford and the Chamber's contentions are unavailing for several reasons.

The law in California is that punitive damages are permitted in product liability actions precisely because "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. [Citations.] Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles." (*Grimshaw*, *supra*, 119 Cal. App. 3d at p. 810.) Compliance with a law or safety regulation in itself does not establish that a product is not defective or that a defendant who sells or rents the product for use by the public has exercised due care. (*See Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126-127 [184 Cal. Rptr. 891, 649 P.2d 224]; *Amos v. Alpha Property Management* (1999) 73 Cal.App.4th 895, 901 [87 Cal. Rptr. 2d 34].)

The Chamber asks us to reject the rule stated above in *Grimshaw*, *supra*, 119 Cal. App. 3d 757, that compliance with industry standards does not bar punitive damages, because that decision predates amendments to Civil Code section 3294 that modified the definitions of "oppression, fraud [and] malice" and required proof by clear and convincing evidence. But *Grimshaw* did not base its conclusions on the standard of proof for punitive damages claims or the precise definitions of the terms "oppression, fraud and malice." The Chamber points to nothing in the 1987 amendments, or to any legislative history for those amendments, suggesting the Legislature intended to disapprove *Grimshaw*.

The Chamber relies on the extensive federal regulation of the automobile industry through the NHTSA and the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act) (49 U.S.C. § 30101 et seq.), which, in conjunction with NHTSA-promulgated standards, has declared the minimum safety standards for automobiles.

However, a review of the Safety Act and its legislative history demonstrates that the federal government did not intend to preclude punitive damages where an auto manufacturer has met minimum safety standards.

Title 49 United States Code section 30103(e) (section 30103(e)) of the Safety Act contains a savings clause that provides: "Compliance with a motor vehicle safety standard prescribed under this chapter *does not exempt a person from liability at common law*." (Italics added.)

Thus, section 30103(e) expressly provides that compliance with federal safety standards is *not* a defense to state common law products liability. Punitive damages have long been a part of the common law, originating in the 1763 English case *Huckle v. Money* (1763) 95 Eng.Rep. 768, and finding early acceptance in the United States when the United States Supreme Court upheld its constitutionality in *Day v. Woodworth* (1851) 54 U.S. 363, 370 [14 L. Ed. 181]. Thus, in enacting this savings clause, Congress was aware that part of the common law to which it referred in section 30103(e) included liability for punitive damages and could have excluded such damages from its terms.

The Chamber asserts that Congress, in enacting the savings clause in section 30103(e), only sought to preserve common law liability in general and did not intend to address punitive damages. However, a review of the legislative history of the Safety Act further demonstrates that Congress intended through the savings clause to leave untouched all aspects of common law products liability actions, including awards of punitive damages.

The House Report for the Safety Act states that section 30103(e) "is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense *or otherwise to affect the rights of parties under common law particularly those related to warranty, contract, and tort liability*." (H.R.Rep. No. 1776-89, 2d Sess., p. 24

(1966), italics added.) The Safety Act's Senate sponsor stated on the Senate floor that "[c]ompliance with Federal standards would not necessarily shield any person from broad liability at the common law. *The common law on product liability still remains as it was.*" (Remarks of Sen. Magnuson, 89 Cong. Rec. 14230 (daily ed. June 24, 1966), italics added.) Its House sponsor, while arguing in floor debate against the need for criminal penalties in the Safety Act stated, "[W]e have preserved *every single common law remedy that exists against a manufacturer* for the benefit of a motor vehicle purchaser. This means that all of the warranties and all of the other devices of common law which are afforded to the purchaser, remain in the buyer and they can be exercised against the manufacturer." (Remarks of Rep. Staggers, 89 Cong. Rec. 19663 (daily ed. Aug. 17, 1966), italics added.)

The fact that California does not follow this proposed rule that compliance with federal minimum safety standards bars claims for punitive damages is also demonstrated by the fact that such a rule has been proposed through legislation in California on several occasions but has not been enacted. In 2000 the Legislature considered a bill that would have enacted the rule that Ford proposes. (Assem. Bill No. 2582 (1999-2000 Reg. Sess.) § 1.) However, the bill never made it out of committee. (Assem. Bill No. 2582, from committee without further action, 2 Assem. Final Hist. (1999-2000 Reg. Sess.) p. 1865.) A similar bill did not secure passage in 1996. (Assem. Bill No. 2880, from committee without further action, 2 Assem. Final Hist. (1995-1996 Reg. Sess.) p. 1711.) Another such bill was introduced in February 2006 in the Senate. (Sen. Bill No. 1429 (2005-2006 Reg. Sess.) § 2.) There would be no need for such legislation if compliance with government standards already provided a defense to punitive damages claims.

Ford and the Chamber's argument is also unavailing because there are no federal standards for stability of

vehicles, one ground upon which Ford's liability for punitive damages is based. Ford points to a NHTSA regulation requiring all SUV's to display a warning concerning the risk of rollovers. (*See* 49 Fed.Reg. 20016 (May 11, 1984).) However, having a warning sticker is not the same as meeting a safety standard, and, in any event, it would not bar a state law claim alleging stability defects.

The Chamber asserts that NHTSA's failure to promulgate stability standards and to require only a warning sticker represents a "policy choice" based upon difficulties in predicting rollover risk and that compliance with the warning requirement alone should bar punitive damages. However, this exact argument was rejected by the Eleventh Circuit in *Watkins v. Ford Motor Co.* (11th Cir. 1999) 190 F.3d 1213, 1216-1218, a Bronco II rollover case. (*See also Ford Motor Co. v. Ammerman* (Ind.Ct.App. 1999) 705 N.E.2d 539, 555-556.)

Ford's asserted compliance with federal safety regulations did not bar the punitive damages award.

C. Fair Notice of Exposure to Punitive Damages

Ford contends that if punitive damages can be awarded on this record, Civil Code section 3294 is unconstitutionally vague because it failed to give Ford fair notice that its conduct could subject it to punitive damages. This contention is unavailing.

Ford made just this argument 25 years ago in *Grimshaw*, *supra*, 119 Cal. App. 3d 757. The Court of Appeal rejected it, concluding that "punitive damages are recoverable in a nondeliberate or unintentional tort where the defendant's conduct constitutes a conscious disregard of the probability of injury to others." (*Id.* at p. 811.)

Additionally, Ford bases this contention on the fact that at most, reasonable people could disagree with the decisions

it made. However, we have already discussed and rejected this argument, *ante*.

D. Consideration of Ford's Overall Financial Condition

Ford asserts that the punitive damages award must be reversed because the jury was allowed to consider its overall financial worth (almost $13 billion) as opposed to its worth tied to sales of products in California. We reject this contention.

Where the defendant's oppression, fraud or malice has been proven by clear and convincing evidence, California law permits the recovery of punitive damages "for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) As our Supreme Court recently held, in *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1185 [29 Cal. Rptr. 3d 379, 113 P.3d 63] (Simon): "[T]he defendant's financial condition is an essential factor in fixing an amount that is sufficient to serve these goals without exceeding the necessary level of punishment. '[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.' [Citation.] '[P]unitive damage awards should not be a routine cost of doing business that an industry can simply pass on to its customers through price increases, while continuing the conduct the law proscribes.' [Citation.]" (*See also State Farm, supra*, 538 U.S. at p. 428 [use of wealth as a factor not " 'unlawful or inappropriate' "].)

Despite this authority, however, Ford cites *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253 [11 Cal. Rptr. 3d 317] (*R.J. Reynolds*) for the proposition that in assessing punitive damages courts may only take into consideration the defendant's financial figures in the state where the wrong occurred.

In *R.J. Reynolds*, the State of California filed a complaint against the defendant tobacco company for an enforcement order of a consent decree entered into as part of a settlement agreement that prohibited targeting youth in advertising of tobacco products. The superior court found the defendant in violation of that agreement and entered summary judgment, permanently enjoining the company from continuing to violate the settlement. The court also awarded the state sanctions in the amount of $20 million. The defendant appealed, and this court reversed the award of sanctions, finding them to be excessive. Relying on recent United States Supreme Court precedent holding that it was improper to impose punitive damages against a defendant for conduct in one state based upon the defendant's out-of-state conduct, we held that the superior court in *R.J. Reynolds* erred when it based its sanctions award on the defendant's nationwide spending on advertising, as opposed to its advertising activities in California. (*R.J. Reynolds*, *supra*, 116 Cal.App.4th at pp. 1289-1290.) This court found the sanctions award to be error because "the People's request for $20 million in sanctions was based on Reynolds's nationwide spending on print advertising and profitability without evidence of its advertising spending or profitability in California." (*Id.* at p. 1290.) As the court stated in *R.J. Reynolds*, "the award of sanctions for Reynolds's conduct in California could not properly be based on Reynolds's nationwide financial figures without violating Reynolds's due process rights." (*Id.* at p. 1289.)

Based upon the above quoted language, Ford asserts that it was error to allow evidence of its overall financial condition, as opposed to its financial worth in California. This contention is unavailing.

Here, the trial court properly instructed the jury, at Ford's request, that it could not consider Ford's out-of-state conduct in imposing punitive damages: "In determining the amount

of punitive damages, if any, that is necessary to achieve the proper level of punishment and deterrence, you may consider only Ford's wrongful conduct, if any, that has had an adverse impact on the citizens of California. Accordingly, you may not award any punitive damages for the purpose of punishing Ford for the sale of vehicles in other states for any injuries that may have occurred in other states, or for the purpose of changing Ford's conduct in other states."

Consideration of Ford's overall financial condition was not allowed to punish it for out-of-state conduct as in *R.J. Reynolds*, but for the broader concept of ensuring that the amount of punitive damages was sufficient to act as a deterrent. Use of a defendant's financial condition in such a manner is proper because " 'the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.' " (*Simon, supra*, 35 Cal.4th at p. 1185.) Consideration of only a defendant's finances as they relate to the state in which they are sued would allow it to make them " 'a routine cost of doing business that an industry can simply pass on to its customers through price increases, while continuing the conduct the law proscribes.' [Citation.]" (*Ibid.*)

E. Amount of Award

Last, Ford argues that the amount of the punitive damages awarded to the Wilsons is excessive under the federal Due Process Clause of the 14th Amendment to the United States Constitution. We conclude that, after reducing the noneconomic damages award to Mrs. Wilson to $18 million, the award of punitive damages is excessive and will be reduced to $55 million, an approximate two-to-one ratio to the total compensatory damages award ($4.6 million in economic damages + $18 million in noneconomic damages + $5 million in loss of consortium damages = $27.6 million x 2 = $55.2 million).

1. Standard of review

"In deciding whether an award of punitive damages is constitutionally excessive . . . we are to review the award de novo, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct. [Citations.] This '[e]xacting appellate review' is intended to ensure punitive damages are the product of the ' " 'application of law, rather than a decisionmaker's caprice.' " ' [Citation.] [¶] On the other hand, findings of historical fact made in the trial court are still entitled to the ordinary measure of appellate deference." (*Simon*, *supra*, 35 Cal.4th at p. 1172, fn. omitted.)

"To state a particular level beyond which punitive damages in a given case would be grossly excessive, and hence unconstitutionally arbitrary, ' "is not an enviable task. . . . In the last analysis, an appellate panel, convinced it must reduce an award of punitive damages, must rely on its combined experience and judgment." ' [Citation.]" (*Simon*, *supra*, 35 Cal.4th at p. 1188.) Moreover, our "constitutional mission is only to find a level higher than which an award may not go; it is not to find the 'right' level in the court's own view." (*Ibid.*)

2. Analysis

The United States Supreme Court has determined that the federal Due Process Clause places limits on state courts' awards of punitive damages, limits appellate courts are required to enforce in their review of jury awards. (*State Farm*, *supra*, 538 U.S. at pp. 416-418.) The imposition of "grossly excessive or arbitrary" (*id.* at p. 416) awards is constitutionally prohibited, for due process entitles a tortfeasor to " 'fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.' " (*Id.* at p. 417.)

The United States Supreme Court and the California Supreme Court have stated that there are three factors to consider in determining whether the amount of a punitive damages award comports with the federal Due Process Clause: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the . . . harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages [and comparable civil penalties where available]." (*State Farm*, *supra*, 538 U.S. at p. 418; see *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191 [29 Cal. Rptr. 3d 401, 113 P.3d 82].) We discuss these factors in order.

Reprehensibility of conduct

Courts utilize five factors to help determine the degree of reprehensibility of a defendant's conduct: (1) whether the harm was physical and not merely economic; (2) whether the conduct demonstrated an indifference or reckless disregard for the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct was repeated or an isolated incident; and (5) whether the conduct was the result of intentional acts or mere accident. (*State Farm*, *supra*, 538 U.S. at p. 419; *Simon*, *supra*, 35 Cal.4th at p. 1180.) Further, the reprehensibility of a defendant's conduct is the most important indicator of the reasonableness of a punitive damages award. (*State Farm*, *supra*, 538 U.S. at p. 419; *Simon*, *supra*, 35 Cal.4th at p. 1180.)

Based upon our de novo review of the record, we conclude that the reprehensibility of Ford's conduct was high, given the catastrophic nature of Mrs. Wilson's injuries, Ford's reckless disregard for the safety of others, the repeated nature of Ford's conduct, and the fact that Ford's acts were intentional.

Focusing on the first factor, Ford's decision to release the defective Explorer resulted in catastrophic and permanent

physical injuries to Mrs. Wilson, not merely economic loss. She is permanently paralyzed and in constant, debilitating, pain. She is confined to a wheelchair, without sensation or muscular control of her lower body. She must rely on others to care for her. As Mrs. Wilson explained it: "Me being dependent on other people . . . for me that is very difficult because I have always been an independent sort of person. . . . I have always been the one that has done things for other people. For me that is very hard to . . . have to be in that kind of position. . . . I am in a wheelchair, I am not going to ever be out of a wheelchair, that whole concept is very . . . difficult to . . . accept. . . . The things that I really love to do I can't do anymore. The list is just—goes on and on."

As discussed *ante*, and as found by the jury, Ford's decision to release the defective Explorer without warning consumers of the risk of injury it posed evinced a reckless disregard for the safety of its customers. As the trial court noted in ruling on Ford's motion for new trial on the ground the punitive damage award was excessive, "the evidence showed Ford had a pattern of deficient design regarding safety in favor of increased financial returns and was the result of the conscious disregard of Ford executives." Our own independent review of the record compels the same conclusion. Thus, the second factor also supports a significant punitive damages award.

The target of the conduct in this case was consumers, individuals who were vulnerable as they would not understand vehicle design, development and manufacture, and would rely on Ford to inform them of risks as they made purchasing decisions.

Conduct is more reprehensible where, as here, it is part of repeated corporate policy or practice rather than an isolated incident. (*Johnson v. Ford Motor Co.*, *supra*, 35 Cal.4th at p. 1196.) In this case the conduct was repeated and not an

isolated incident. Ford had a pattern of deficient safety design that was ignored in favor of increased financial returns. As discussed in more detail, *ante*, that corporate policy or practice was evidenced by Ford's refusal to follow its engineers' recommendations to improve the stability of the Explorer. As the trial court noted, "[T]hat evidence was primarily adduced through Ford's own internal memoranda and correspondence."

The evidence presented by the Wilsons in this case supports a finding that Ford's actions were the result of intentional conduct and deliberate decisions by Ford's management, knowing the unreasonable risk of harm posed to consumers, as opposed to a mere accident.

Moreover, the fifth factor, whether the conduct was the result of intentional acts or mere accident, "is of little value in assessing a California punitive damages award, as accidentally harmful conduct cannot provide the basis for punitive damages under our law. At a minimum, California law requires conduct done with 'willful and conscious disregard of the rights or safety of others' or despicable conduct done 'in conscious disregard' of a person's rights." (*Simon*, *supra*, 35 Cal.4th at p. 1181.) The jury's finding that Ford acted with "oppression, fraud or malice" demonstrates Ford's actions were intentional. In sum, the reprehensibility of Ford's conduct supports a significant award of punitive damages.

3. Ratio of punitive to compensatory damages

In *State Farm*, the United States Supreme Court, while still "declin[ing] . . . to impose a bright-line ratio which a punitive damages award cannot exceed," held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*State Farm*, *supra*, 538 U.S. at p. 425.) The high court "also explained that past decisions and statutory penalties approving ratios of three or four to one were

'instructive' as to the due process norm, and that while relatively high ratios could be justified when ' "a particularly egregious act has resulted in only a small amount of economic damages" [citation] . . . [t]he converse is also true. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.' " (*Simon*, *supra*, 35 Cal.4th at p. 1182.)

Our high court has interpreted this language from *State Farm* to mean that it established a "type of presumption: ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than 9 or 10 to 1 are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause." (*Simon*, *supra*, 35 Cal.4th at p. 1182, fn. omitted.)

Here, after our reduction of the noneconomic damages awarded to Mrs. Wilson, the compensatory damages, while substantial, are within a reasonable range for the type of catastrophic, permanent and ongoing injuries suffered by Mrs. Wilson, and the loss of her society, comfort and companionship to Mr. Wilson. Mrs. Wilson's recovery for noneconomic damages is proportionate to the injuries she suffered. Similarly, Mr. Wilson's recovery on his loss of consortium claim is proportionate to his substantial injury. Moreover, as discussed, *ante*, there was a high degree of reprehensibility to Ford's conduct. Because the noneconomic damages award is substantial, a low single digit ratio is appropriate. We are mindful of the Supreme Court's statement in *State Farm*, *supra*, 538 U.S. at page 425 that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." In

this case we conclude that a two-to-one ratio is warranted because the degree of Ford's reprehensibility is also high.

4. Comparable civil penalties

Ford does not address this factor in its opening brief. However, for the first time in its reply brief Ford asserts that there are comparable civil penalties to compare with the amount of the punitive damages claim. Ford cites title 49 United States Code section 30165(a) which it claims provides penalties for designing and selling defective vehicles, penalties that are $1,000 for each vehicle, up to a maximum of $800,000. Ford asserts that since the punitive damages award "dwarfs" the maximum penalties allowed under that federal statute, the punitive damage award is constitutionally infirm. This contention is unavailing.

First, we do not consider matters raised by appellants for the first time in their reply briefs. Because Ford did not address this factor in its opening brief, thus denying the Wilsons an opportunity to respond, it has waived the right to assert this issue on appeal. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761 [27 Cal. Rptr. 3d 648, 110 P.3d 903]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10 [93 Cal. Rptr. 2d 364].)

Additionally, title 49 United States Code section 30165(a) is part of that portion of the Safety Act which provides, as discussed, *ante*, only minimum safety standards. Moreover, as also discussed in detail, *ante*, there is a savings clause that allows common law liability notwithstanding compliance with those standards, putting Ford on notice that it may be subject to private state actions that result in substantially higher damage awards than the civil penalties. The savings clause also evidences congressional intent that the maximum penalty allowed under title 49 United States Code section 30165 is not a sufficient penalty for all such violations because the varying degrees of plaintiffs' injuries

and defendants' culpability dictate a greater flexibility in punishment. (See *Ford Motor Co. v. Sperau* (Ala. 1997) 708 So. 2d 111, 122.)

Finally, the sanctions amounts in title 49 United States Code section 30165(a) were increased in 2000 to a range of $5,000 to $15 million, indicating Congress's belief that the original amounts were insufficient to deter vehicle manufacturers from placing defective automobiles on the road. The maximum penalty under the 2000 amendments is not "dwarfed" by the punitive damage award, as remitted.

5. Conclusion

Based upon the foregoing factors, and using our combined experience and judgment, we conclude that a two-to-one ratio of punitive damages to compensatory damages is sufficient to punish Ford and deter it from similar conduct in the future. This ratio is proportionate to the degree of harm suffered and the substantial award of compensatory damages. An award exceeding a two-to-one ratio would exceed the constitutional maximum that could be awarded under the facts of this case. (*Simon*, *supra*, 35 Cal.4th at p. 1188 [An appellate court's "constitutional mission is only to find a level higher than which an award may not go; it is not to find the 'right' level in the court's own view"].) Accordingly, we remit the punitive damage award to $55 million, approximately two times the total compensatory damage award to the Wilsons. If the Wilsons do not agree to the reduced amount, the matter will be reversed and remanded for a new trial on the issue of punitive damages, as specified in California Rules of Court, rule 24(d).

DISPOSITION

The judgment is affirmed in all respects except as to the award of noneconomic damages to Mrs. Wilson and punitive damages to the Wilsons. The award of noneconomic damages to Mrs. Wilson and punitive damages to the

Wilsons is reversed and remanded for retrial on the issue of the amount of noneconomic and punitive damages, unless the Wilsons shall, within 30 days from the date this opinion is filed, file with the clerk of this court and serve upon Ford the Wilsons' written consent to a reduction of Mrs. Wilson's noneconomic damages award to $18 million and the Wilsons' punitive damage award to $55 million, in which event the judgment will be modified to award the Wilsons noneconomic and punitive damages in that amount, and which will result in a total reduced award of $82,606,004 ($4,606,004 in economic damages + $18 million in noneconomic damages + $5 million in loss of consortium + $55 million in punitive damages), and in which event the judgment will be affirmed in its entirety, as modified. (Cal. Rules of Court, rule 24(d).) The parties shall bear their own costs on appeal.

McConnell, P. J., and Irion, J., concurred.

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

BENETTA BUELL-WILSON et al.,
Plaintiffs and Appellants,

v.

FORD MOTOR COMPANY et al.,
Defendants and Appellants.

No. D045154, D045579
(Super. Ct. No. GIC800836)

Court of Appeal, Fourth District, California

August 17, 2006

ORDER MODIFYING OPINION AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on July 19, 2006, be modified as follows:

1. At the end of the second paragraph on page 9, after the sentence ending "disregarding contrary evidence submitted by Ford," add the following citation:

(*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

2. At the end of the second paragraph on page 11, after the sentence ending "whether the Explorer actually passed the computer tests," add the following sentence:

> The Explorer did pass the Consumers Union short course test, but that test was designed to measure its handling, not stability.

3. After the first paragraph on page 26, that terminates with the sentence that ends "off the paved surface of the road," add a new paragraph that reads:

> Further, while the court excluded evidence of the Explorer's comparative safety, accident or injury rates, it did not exclude the Explorer's own "real world safety record," Indeed, Ford never proffered such evidence at trial.

4. In the second full paragraph on page 34, the citation "(See *Raimondi v. Ford Motor Co.* (May 31, 2001, A091865) [nonpub. opn.].)[9]" is deleted. Included in that deletion is footnote 9 in its entirety.

5. In the first full paragraph on page 39, the citation "(See *Raimondi v. Ford Motor Co., supra*, A091865 [nonpub. opn.].)" is deleted.

4. At the end of the first paragraph on page 40, after the sentence ending "as specified in California Rules of Court, rule 24(d)," add as new footnote 9 the following footnote:

> Ford asserts that if the noneconomic damages award to Mrs. Wilson is determined to be the product of passion or prejudice, we are required, as a matter of law, to grant a new trial on all issues. However, case authority demonstrates it is appropriate to issue a remittitur under such circumstances. (See *Deevy v. Tassi, supra*, 21 Ca1.2d at pp.120-121; *Bellman v. San Francisco High School*

Dist. (1938) 11 Cal.2d 576,586-589; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220,1255-1256; *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1011-1012.)

There is no change in the judgment.

The petition for rehearing is denied.

McCONNELL, P.J.

Copies to: All parties

APPENDIX C

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: August 19, 2004

DEPT. 63

PRESENT HON. Kevin A. Enright
JUDGE

CLERK:

Mary Ann Ybanez

GIC800836

BUELL-WILSON,
Plaintiffs

v.

FORD MOTOR COMPANY,
Defendants

MINUTE ORDER ON SUBMITTED MATTER: DEFENDANTS[’] MOTIONS FOR JNOV AND NEW TRIAL

Having taken Defendants Ford Motor Company and Drew Ford’s Motion for JNOV under submission, the Court rules as follows:

Defendants Ford Motor Company and Drew Ford’s Motion for JNOV is denied.

Plaintiffs’ claims are not barred by the California Supreme Court holding in *Ramirez v. Plough* (1993) 6 Ca1.4th 539. Defendants contend *Ramirez* requires the Court

to defer to and adopt the standards enacted by expert administrative agencies. In *Ramirez*, the issue was whether the manufacturer of over-the-counter medication could be liable for distributing its products with English-only labels when it was foreseeable non-English readers would be buying the products. In that instance, the Supreme Court held the standard for the duty of care was the administrative duty of care which only required warning labels in English. However, the Supreme Court also recognized that generally, statutory compliance is not a defense to tort liability. (*Id.* at 547-548.)

However, the current case is more consistent with *Buccery v. General Motors Corp.* (1976) 60 Cal.App.3d 533, cited with approval in Ramirez. In *Buccery*, the plaintiff was involved in a motor vehicle accident where the impact caused the rear of plaintiff's head to strike the rear window of his pick-up truck. Plaintiff sued the manufacturer for design defect for its failure to install head restraints. The Court of Appeal held compliance with federal safety standards does not preclude imposition of common law liability for a defective product and that federal regulations are supplementary to the common law of products liability. (*Id.* at 540-541.) The Buccery case is more analogous to the facts of this case and thus, Plaintiffs' claims are not barred.

Neither are Plaintiffs' claims preempted by federal law. 49 USCA §30103(b) addresses the issue of preemption and states:

> Preemption (1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a state may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the

> United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.

That same statute also includes a savings clause which states:

> Common law liability.—Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law. (49 USC §30103(e).)

In this case, with regard to the issue of stability, there is no applicable federal standard in place which would preempt Plaintiffs' state tort claims. Ford cites to the National Highway Traffic Safety Administration's ("Safety Administration") rejection of the use of the Stability Index, however, the non-existence of the safety standard cannot preclude state tort claims under these statutes.

Ford argues that since the Safety Administration has failed to adopt the use of the Stability Index as a standard, Plaintiffs are precluded from using the Stability Index to show a defect. Ford relies on *Geier v. American Honda Motor Company* (2000) 529 U.S. 861, where the plaintiff sued the vehicle manufacturer for failure to equip the vehicle with airbags. The Supreme Court held the action was preempted since it actually conflicted with the Department of Transportation standard requiring manufacturers to place driver's side airbags in some, but not all 1987 automobiles. Unlike *Geier*, since the Safety Administration did not adopt a stability standard, there is no federal standard with which to conflict, and Plaintiffs' claims are not preempted.

With regard to the roof strength, Ford asserts the Explorer meets the requirements of Federal Motor Vehicle Safety Standard ("FMVSS") 216. However, the FMVSS is a minimum standard and does not preclude a finding of a product defect. The savings clau e in 49 U.S.C. § 30103 is meant to leave room for state law claims, especially in cases such as this where the federal safety standard is a minimum safety standard. (*Geier* at 868.)

Substantial evidence supports the jury's verdict that Defendant Drew Ford failed to warn the Wilsons of the Explorer's dangerous propensities. Mrs. Wilson testified she asked the salesmen whether the Explorer would rollover and also that she would not have bought the vehicle if she had been told there was a danger of rollover. Further the Wilsons testified no one at Drew Ford warned them regarding proper inflation of the tires. In fact, the Drew Ford employees testified they did not know the proper tire pressure. Therefore, there is substantial evidence to support the judgment on the failure to warn issue.

Substantial evidence also supports the jury's verdict that Defendant Ford failed to warn of the crashworthiness of the roof related structure. Plaintiffs' expert Mr. Forrest testified weaker A-pillars and B-pillars were used in the Explorer which resulted in the Explorer having a propensity to collapse in a rollover collision. The evidence showed Ford was aware of such. Ford was not found liable on the issue of failure to warn with regard to stability. (Special Verdict No. 7.)

With regard to the compensatory damages, Plaintiffs presented substantial evidence to support the Wilsons' non-economic damage claims, including the difficulties of their daily life and the past, current and future physical pain Mrs. Wilson endures.

Ford argues judgment should be granted in favor of Ford on the issue of punitive damages because at most, Plaintiffs

showed reasonable people disagree on the design of the Explorer. However, Plaintiff presented clear and convincing evidence Ford acted with malice and that Ford acted with a conscious disregard for the safety of others. Even if there was a disagreement between reasonable experts, it does not negate the clear and convincing evidence that Ford acted with malice. Therefore, the motion for JNOV of the issue of punitive damages on this basis is denied.

In addition, Ford argues punitive damages should not be awarded because Civil Code §3294 violates Ford's due process rights. The Ford Explorer met all of the national safety requirements and thus, Ford had no notice of what acts would subject it to punitive damages. First, applying or redrafting Civil Code §3294 as suggested by Ford would require articulating all conduct that is despicable and obviate the plain meaning of the statute. Furthermore, Ford continues to focus on the product and not the process by which the Explorer was developed. Ford cannot protect itself by arguing the vehicle meets all applicable safety standards when there is evidence Ford knew of potentially fatal defects during the development and manufacture of the vehicle not addressed by the safety standards and chose not to remedy those problems. Such acts constitute despicable conduct and expose Ford to the prospect of punitive damages.

It is obvious the punitive damages awarded were twice the amount of compensatory damages awarded. The US Supreme Court held that single-digit multipliers of the compensatory damages comport with due process while still achieving a state's goal of deterrence and retribution. (*State Farm v. Campbell* (2002) 538 U.S. 408, 425.) The Supreme Court stated State Farm's out-of-state conduct could not justify a 145-1 compensatory to punitive damage award and State Farm should only be punished for its conduct directed at the plaintiffs. (*Id.* at 426-427.)

Ford argues that the case of *People v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253 holds that nationwide financial figures cannot serve as a basis for punitive damages in California. However, the *R.J. Reynolds* case involved substantially different circumstances. The State of California and R.J. Reynolds had settled a case regarding the tobacco company's advertising to minors. In that case, the State of California was requesting punitive damages for R.J. Reynolds' violation of a Master Settlement Agreement in the amount of $20 million, which represented 10 percent of Reynolds' nationwide advertising spending. No compensatory damages were awarded, therefore the measure of punitive damages could not be calculated based on a single-digit multiplier. In that case, it is clear the only basis for punitive damages was the in-state financial figures of R.J. Reynolds. In this case, however, the punitive damages were within the single-digit multiplier limit set forth in State Farm, and the punitive damage verdict is not unconstitutional.

Furthermore, the focus on just the injuries incurred by the plaintiffs does not serve as an evidentiary limitation on financial information. (*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, fn. 7.) "Evidence of defendant's financial condition is not unlawful or inappropriate under *State Farm*." (*Id.*) Thus, Plaintiffs' presentation of the net worth of Ford was not improper.

In addition, the Court has ordered a remittitur in the context of Ford's motion for a new trial.

Plaintiffs' evidentiary objections to the declaration of William Thomson are overruled.

Defendants' request for judicial notice of Exhibits 2-4, 8, 10-24 and 40-42 is granted and the remaining requests are denied.

Defendants' request for judicial notice of Exhibit 3 to the Supplemental Notice of Lodgment is granted.

Defendant's request for judicial notice of Exhibit 4 to the Supplemental Notice of Lodgment is denied. (Ford's Reply, footnote 6.)

Defendants' evidentiary objections to the declaration of James Iagmin are overruled.

Defendants' evidentiary objections to the declaration of Allan Kam are sustained.

MOTION FOR NEW TRIAL

Having taken Defendants Ford Motor Company and Drew Ford's Motion for a New Trial under submission, the Court rules as follows:

Defendants Ford Motor Company and Drew Ford's Motion for a New Trial is granted on the issue of damages only on the ground of excessive damages subject to the condition the motion for a new trial is denied if the Plaintiffs consent to a reduction of damages.

The Court finds that the damages awarded are excessive. Therefore, a remittitur is appropriate. The Court does not find that the jury rendered its verdict due to passion or prejudice. Pursuant to Code of Civil Procedure section 662.5(b), the Court grants a new trial on the issue of damages only on the ground of excessive damages subject to the condition that the motion for a new trial is denied if the plaintiffs consent to a reduction of those damages. In exercising its independent judgment as to what are fair and reasonable damages based upon the evidence and law, the Court finds that the compensatory damages awarded to plaintiff Benetta Buell-Wilson should be reduced to $70,000,000, the compensatory award to plaintiff Barry Wilson should be reduced to $5,000,000, and the punitive damage award to both should be reduced to $75,000,000, making the total award $150,000,000.

This order is based on the following reasons:

The evidence, in the Court's opinion, is insufficient to support a compensatory damage verdict in favor of Ms. Buell-Wilson in the amount of $109,606,004. In reaching that finding and the other findings on the verdict on damages, the Court has weighed the evidence, including reasonable inferences therefrom, and is convinced from the entire record the jury clearly should have reached a different verdict on damages. That same evidence, however, recited below, is sufficient to support a compensatory damage award in favor of Ms. Buell-Wilson in the amount of $70,000,000.

In determining what is fair and reasonable, there is no question that reasonable minds can differ. In exercising its independent judgment, the Court has considered all the evidence presented by both sides.

The jury obviously found that both plaintiffs were excellent witnesses on their own behalf. The Court agrees. Both were forthright and sincere. Neither exaggerated either the injuries Mrs. Buell-Wilson sustained in the accident or the circumstances resulting therefrom.

Ms. Buell-Wilson's back was broken in the accident. Paraplegia at the level of T12 has resulted in no function or sensation in her lower body. That is permanent.

The jury found that Ms. Buell-Wilson's past economic loss amounted to $573,348 and her future economic loss amounted to $4,032,656. Those figures are not in dispute in this motion.

With regard to her non-economic damages, the plaintiff testified that before the accident she was an avid outdoors person and led an active and rewarding life. She has a black belt in karate. She frequently hiked and camped with her family.

Following the accident, Ms. Buell-Wilson remained hospitalized for approximately two months. Her doctors testified that she suffers constant aching in her back where

surgically implanted rods remain. She experiences stabbing and shooting pain over her right side. Her pain will increase over the rest of her life.

She suffers from a neurogenic bladder and bowel. While hospitalized, she suffered four urinary tract infections. Those have been recurring and could potentially be fatal. Due to her lack of sensation and control in her genital area and buttocks, her ability to recognize infection is lessened. Such infections will require hospitalization in the future. Because Ms. Buell-Wilson has no control of her bowel and bladder, she must manually extract fecal matter and catheterize herself several times each day.

Ms. Buell- Wilson's shoulder joints are rapidly degenerating and cause and will continue to cause her a significant amount of pain due to the frequent transfers to and from her wheelchair each day. She is unable to reach her second-story bedroom and must sleep in the laundry room in the garage of her home. Ms. Buell-Wilson can no longer perform the active volunteer work in which she engaged before the accident. All of this evidence was mostly uncontroverted.

As for the compensatory award to Mr. Wilson, the evidence is insufficient to support a compensatory damage verdict in favor of Mr. Wilson in the amount of $13,000,000 for loss of consortium. That same evidence, however, is sufficient to support a compensatory damage award in his favor in the amount of $5,000,000.

Mr. Wilson is his wife's caretaker. To help prevent pressure sores, Mr. Wilson rolls his wife over in bed on occasion each night. He assists her with wheelchair transfers and catheterizations. The intimate life he and his wife shared has been lost. They no longer hike and camp together.

While the Court finds the verdict of the compensatory damages in favor of Ms. Buell-Wilson and Mr. Wilson to be

..cessive, the Court finds that the compensatory awards to both, as reduced, are fair and reasonable in the exercise of its independent judgment. Those determinations are based upon the reasons mentioned above, which highlight the evidence on damages presented at trial.

The Court finds the punitive damages verdict to be excessive as well and reduces the punitive damages award to $75,000,000. The reasons are as follows:

The evidence is insufficient to support a punitive damages verdict in the favor of the Wilsons in the amount of $246,000,000. That same evidence, however, is sufficient to support a punitive damages award in the amount of $75,000,000.

In evaluating the punitive damages, the courts must consider three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408,418. In analyzing those three guideposts, the Court concludes the punitive damages award must be reduced.

Substantial evidence supports the finding of malice on the part of Ford and a high degree of reprehensibility. The degree of reprehensibility is determined by considering whether:

> [T]he harm caused was physical as opposed to economic; the tortious conduct" evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result

> of intentional malice, trickery, or deceit, or mere accident. (*Id.* at 419.)

In considering these factors, the evidence showed Ford had a pattern of deficient design regarding safety in favor of increased financial returns and was a result of the conscious disregard of Ford executives. That evidence was primarily adduced through Ford's own internal memoranda and correspondence. This conduct was reprehensible and weighs in favor of punitive damages.

The remittitur reduces the punitive damage award to a one-to-one ratio relative to the compensatory award. This is well within the second guidepost set forth by the Supreme Court. Even as reduced, the compensatory damage award is large. When compensatory awards are substantial, a ratio of equal to the compensatory damages is within the limits of the due process guarantee. (*Id.* at 425.) The punitive damages are fair and reasonable and proportionate to the amount of harm suffered by the Plaintiffs.

With regard to the third guidepost, the harm suffered by Ms. Buell-Wilson could have resulted in criminal penalties although that fact alone does not warrant the imposition of punitive damages. (*Id.* at 428.) The statutory penalties for a non-compliant and defective vehicle do not fully address potential physical or fatal injury to victims. After consideration of the criminal and civil penalties, the Court concludes neither a higher or lower ratio between the compensatory and punitive damage awards, as reduced, are required.

With regard to the evidentiary issues as a basis for a new trial, the motion for new trial is denied.

The safety records of other vehicles were properly excluded. A product is defective if the product fails to perform as safely as an ordinary consumer would expect when used in the intended manner or where there is risk of

danger inherent in the design which outweighs the benefits of that design. (*Barker v. Lull Engineering Co., Inc.* (1978) 20 Cal.3d 413.) Ford advocates that evidence of the safety of other SUVs is necessary to show the safety of the Ford Explorer. However, under the *Barker* analysis, the only issue is the safety of the Explorer. "In a strict products liability case, industry custom or usage is irrelevant to the issue of defect." (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 803.) The issue is whether the product is defective, not whether it is better than the other products on the market.

Ford argues the Bronco II evidence should have been excluded. Evidence of a predecessor model's defect is admissible only if the other version and current version are substantially similar. The Plaintiffs are not required to prove the Bronco II was exactly the same as the 1997 Ford Explorer driven by Mrs. Wilson, only that they are substantially similar. (*Hasson v. Ford Motor Co.* (1982) 32 Ca1.3d 388, 404.) In the instance where the evidence is offered to show the defendant had notice, a lesser showing of similarity is necessary. (*Id.*; *Laird v. T. W. Mather Inc.* (1958) 51 Ca1.2d 210, 220.) The determination of whether the previous model is substantially similar is left to the trial judge. (*Jensen v. Southern Pacific Co.* (1954) 129 Ca1.App.2d 67, 74.) In this case, Plaintiffs presented substantial evidence of the design carry-over from the Bronco II to the Explorer, evidence of the intermingling of the development and testing of the Bronco II and the Explorer and the similar source of rollover problems between the Bronco II and Explorer for the Court to find the two vehicles are substantially similar.

If Plaintiffs accept the remittitur, Plaintiffs shall submit an amended judgment to the Court.

Plaintiffs' objections to the declaration of Ann Cochran are overruled.

Plaintiffs' objections to the declaration of Richard Serafini are overruled.

Plaintiffs' objections to the declarations of George L. Priest and W. Kip Viscusi are sustained.

Defendants' objections to the declarations of Dennis Schoville and Louis Amell are overruled.

IT IS SO ORDERED.

Dated: August 19, 2004 KEVIN A. ENRIGHT

KEVIN A. ENRIGHT
Judge of the Superior Court

APPENDIX D

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

BENETTA BUELL-WILSON;
BARRY S. WILSON,
Plaintiffs,

v.

FORD MOTOR COMPANY,
a Delaware Corporation;
DREW FORD, a California Corporation,
Defendants.

Case No. GIC800836

June 25, 2004

JUDGMENT ON SPECIAL VERDICT

This action came on regularly for trial on March 15, 2004, in Department 63 of the San Diego Superior Court, the Honorable Kevin A. Enright, Judge presiding; plaintiffs Benetta Buell-Wilson and Barry S. Wilson appearing by Dennis A. Schoville and Louis G. Arnell of Schoville & Arnell, LLP, and defendants Ford Motor Company and Drew Ford appearing by Ronald E. Cabaniss, Rand Wallis and Todd Croftchik of Cabaniss Smith Tocle & Wiggins and Anthony Sonnett of Yukevich & Sonnett.

A jury of twelve persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the

jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to-wit:

We answer the questions submitted to us as follows:

1. Did the 1997 Ford Explorer have a defect in its design as to its stability?

x Yes ___No

If your answer to Question No. 1 is "Yes", then answer Question Nos. 2 and 3. If your answer to Question No. 1 is "No", then answer Question No. 4.

2. Was the defect in design as to the stability of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

x Yes ___No

Answer Question No. 3.

3. Was the defect in design as to the stability of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

x Yes ___No

Answer Question No. 4.

4. Was there a defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer?

x Yes ___No

If your answer to Question No. 4 is "Yes", then answer Question Nos. 5 and 6. If your answer to Question No. 4 is "No", then answer Question No. 7.

5. Was the defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

x Yes ___No

Answer Question No. 6.

6. Was the defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

x Yes ___No

Answer Question No. 7.

7. Did Ford Motor Company fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the stability of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

___Yes x No

If your answer to Question No. 7 is "Yes", then answer Question Nos. 8 and 9. If your answer to Question No. 7 is "No", then answer Question No. 10.

8. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Benetta Wilson?

___Yes ___No

Answer Question No. 9.

9. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Barry Wilson?

___Yes ___No

Answer Question No. 10.

10. Did Ford Motor Company fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

x Yes ___No

If your answer to Question No. 10 is "Yes", then answer Question Nos. 11 and 12. If your answer to Question No. 10 is "No", then answer Question No. 13.

11. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

x Yes ___No

Answer Question No. 12.

12. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

x Yes ___No

Answer Question No. 13.

13. Did Drew Ford fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the stability of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

x Yes ___No

If your answer to Question No. 13 is "Yes", then answer Question Nos. 14 and 15. If your answer to Question No. 13 is "No", then answer Question No. 16.

14. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Benetta Wilson?

_x_ Yes ___ No

Answer Question No. 15.

15. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Barry Wilson?

_x_ Yes ___ No

Answer Question No. 16.

16. Did Drew Ford fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

_x_ Yes ___ No

If your answer to Question No. 16 is "Yes", then answer Question Nos. 17 and 18. If your answer to Question 16 is "No", then follow the instructions after Question No. 18 below.

17. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

_x_ Yes ___ No

Answer Question No. 18.

18. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

x Yes ___No

Follow the instructions below:

If your answer to any of Question Nos. 2, 5, 8, 11, 14 or 17 is "Yes", then answer Question No. 19. If your answer to any of Question Nos. 3, 6, 9 12, 15 or 18 is "Yes", then answer Question No. 20. Otherwise, stop here, answer no further questions, and have the presiding juror sign and date this form.

19. What are Benetta Wilson's damages?

a. Past economic loss, including lost earnings, lost earning capacity and past medical expenses: $ 573,348

b. Future economic loss, including lost earnings, lost earning capacity and medical expenses: $ 4,032,656

c. Past non-economic loss, including (but not limited to) physical and mental pain and suffering; and loss of enjoyment of life: $ 6,000,000

d. Future non-economic loss, including (but not limited to) physical and mental pain and

suffering; and loss of enjoyment of life: $ 99,000,000

20. What are Barry Wilson's damages?

a. Past loss of companionship, comfort, care, society, assistance, affection, moral support and the loss of sexual relations: $ 3,000,000

b. Future loss of companionship, comfort, care, society, assistance, affection, moral support and the loss of sexual relations: $ 10,000,000

Answer Question No. 21.

21. Did Ford Motor Company act with oppression or fraud or malice?

x Yes ___ No

Signed: Lisa M. Corrie
Presiding Juror

Dated: 6-1-04

After the above verdict on special issues was returned, the same jury of twelve persons was impaneled for the purpose of deciding punitive damages. One witness was sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issue submitted to the jury and the answer given thereto by the jury, which said verdict was in words and figures as follows, to wit:

We, the jury in the above-entitled action, find as follows:

1. What amount of punitive damages, if any, do you award to plaintiffs, Benetta Buell-Wilson and Barry S. Wilson, against Defendant Ford Motor Company?

$ 246,000,000

Dated: June 3, 2004 Lisa M. Corrie
FOREPERSON

It appearing by reason of special verdict that plaintiff Benetta Buell-Wilson is entitled to judgment against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $109,606,004; and Barry Wilson is entitled to judgment against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $13,000,000; and it further appearing by reason of special verdict that plaintiffs Benetta Buell-Wilson and Barry Wilson, jointly, are entitled to judgment against defendant Ford Motor Company for punitive damages in the amount of $246,000,000.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

That plaintiff Benetta Buell-Wilson have judgment against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $109,606,004.

That plaintiff Barry Wilson have judgment against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $13,000,000.

That plaintiffs Benetta Buell-Wilson and Barry Wilson, jointly, have judgment against defendant Ford Motor Company for punitive damages in the amount of $246,000,000.

Plaintiffs shall recover costs in the amount of $ -.

Dated: JUN 25 2004/s/ KEVIN A. ENRIGHT
Hon. Kevin A. Enright

APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

BENETTA BUELL-WILSON, et al.,
Plaintiffs and Appellants,

v.

FORD MOTOR COMPANY,
Defendant and Appellant.

Case No. GIC800836 September 3, 2004

AMENDED JUDGMENT ON SPECIAL VERDICT

This action came on regularly for trial on March 15, 2004, in Department 63 of the San Diego Superior Court, the Honorable Kevin A. Enright, Judge presiding; plaintiffs Benetta Buell-Wilson and Barry S. Wilson appearing by Dennis A. Schoville and Louis G. Arnell of Schoville & Arnell, LLP, and defendants Ford Motor Company and Drew Ford appearing by Ronald E. Cabaniss, Rand Wallis and Todd Croftchik of Cabaniss Smith Toole & Wiggins and Anthony Sonnett of Yukevich & Sonnett.

A jury of twelve persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its

verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to-wit:

We answer the questions submitted to us as follows:

1. Did the 1997 Ford Explorer have a defect in its design as to its stability?

_x_ Yes ___ No

If your answer to Question No. 1 is "Yes", then answer Question Nos. 2 and 3. If your answer to Question No. 1 is "No", then answer Question No. 4.

2. Was the defect in design as to the stability of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

_x_ Yes ___ No

Answer Question No. 3.

3. Was the defect in design as to the stability of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

_x_ Yes ___ No

Answer Question No. 4.

4. Was there a defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer?

_x_ Yes ___ No

If your answer to Question No. 4 is "Yes", then answer Question Nos. 5 and 6. If your answer to Question No. 4 is "No", then answer Question No. 7.

5. Was the defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

__x__Yes ____No

Answer Question No. 6.

6. Was the defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

__x__Yes ____No

Answer Question No. 7.

7. Did Ford Motor Company fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the stability of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

____Yes __x__No

If your answer to Question No. 7 is "Yes", then answer Question Nos. 8 and 9. If 'our answer to Question No. 7 is "No", then answer Question No. 10.

8. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Benetta Wilson?

____Yes ____No

Answer Question No. 9.

9. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Barry Wilson?

___Yes ___No

Answer Question No. 10.

10. Did Ford Motor Company fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

_x_Yes ___No

If your answer to Question No. 10 is "Yes", then answer Question Nos. 11 and 12. If your answer to Question No. 10 is "No", then answer Question No. 13.

11. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

_x_Yes ___No

Answer Question No. 12.

12. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related

structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

__x__Yes ___No

Answer Question No. 13.

13. Did Drew Ford fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the stability of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

__x__Yes ___No

If your answer to Question No. 13 is "Yes", then answer Question Nos. 14 and 15. If your answer to Question No. 13 is 'No", then answer Question No. 16.

14. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the 997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Benetta Wilson?

__x__Yes ___No

Answer Question No. 15.

15. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Barry Wilson?

__x__Yes ___No

Answer Question No. 16.

16. Did Drew Ford fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the

crashworthiness of the roof related structure of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

_x_ Yes ___ No

If your answer to Question No. 16 is "Yes", then answer Question Nos. 17 and 18. If your answer to Question 16 is "No", then follow the instructions after Question No. 18 below.

17. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

_x_ Yes ___ No

Answer Question No. 18.

18. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

_x_ Yes ___ No

Follow the instructions below:

If your answer to any of Question Nos. 2, 5, 8, 11,14 or 17 is "Yes", then answer Question No. 19. If your answer to any of Question Nos. 3, 6, 9 12, 15 or 18 is "Yes", then answer Question No. 20. Otherwise, stop here, answer no further questions, and have the presiding juror sign and date this form.

19. What are Benetta Wilson's damages?

a. Past economic loss, including lost earnings, lost earning capacity and past medical expenses:

$573,348

b. Future economic loss, including lost earnings, lost earning capacity and medical expenses:

$4,032,656

c. Past non-economic loss, including (but not limited to) physical and mental pain and suffering; and loss of enjoyment of life:

$6,000,000

d. Future non-economic loss, including (but not limited to) physical and mental pain and suffering; and loss of enjoyment of life:

$99,000,000

20. What are Barry Wilson's damages?

a. Past loss of companionship, comfort, care, society, assistance, affection, moral support and the loss of sexual relations:

$3,000,000

b. Future loss of companionship, comfort, care, society, assistance, affection, moral support and the loss of sexual relations:

$10,000,000

Answer Question No. 21.

21. Did Ford Motor Company act with oppression or fraud or malice?

x Yes ___No

Signed: Lisa M. Corrie
Presiding Juror

Dated: 6-1-04

After the above verdict on special issues was returned, the same jury of twelve persons was impaneled for the purpose of deciding punitive damages. One witness was sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issue submitted to the jury and the answer given thereto by the jury, which said verdict was in words and figures as follows, to wit:

We, the jury in the above-entitled action, find as follows:

1. What amount of punitive damages, if any, do you award to plaintiffs, Benetta Buell-Wilson and Barry S. Wilson, against Defendant Ford Motor Company?
$246,000,000

Dated: June 3, 2004 Lisa M. Corrie
FOREPERSON

By reason of said special verdict, on June 25, 2004, plaintiff Benetta Buell-Wilson had judgment entered against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $109,606,004; plaintiff Barry Wilson had judgment entered against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $13,000,000; and plaintiffs Benetta Buell-Wilson and Barry Wilson, jointly, had judgment entered against defendant Ford Motor Company for punitive damages in the amount of $246,000,000.

Following entry of judgment, defendants Ford Motor Company and Drew Ford filed Motions for JNOV and for New Trial. After briefing by all parties, and oral argument, on August 19, 2004, the Court issued its written Minute Order. Pursuant to he Minute Order, defendants Ford Motor Company and Drew Ford's Motion for JNOV vas denied; defendants Ford Motor Company and Drew Ford's Motion for a New Trial was granted on the issue of damages only on the ground of excessive damages subject o the condition the Motion for a New Trial would be denied if the plaintiffs consented to reduction of damages, as follows:

> Plaintiff Benetta Buell-Wilson's compensatory damages reduced from $109,606,004 to $70,000,000;
>
> Plaintiff Barry Wilson's compensatory damages reduced from $13,000,000 to $5,000,000;
>
> Punitive damages reduced from $246,000,000 to $75,000,000.

Plaintiffs Benetta Buell-Wilson and Barry Wilson, having accepted the Court's remittitur,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

That plaintiff Benetta Buell-Wilson have judgment against Ford Motor Company and Drew Ford, jointly and severally, in the amount of $70,000,000.

That plaintiff Barry Wilson have judgment against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $5,000,000.

That plaintiffs Benetta Buell-Wilson and Barry Wilson, jointly, have judgment against defendant Ford Motor Company for punitive damages in the amount of $75,000,000.

Plaintiffs shall recover costs in the amount of $_____.

Dated: September 3, 2004

_____
Hon. Kevin A. Enright

APPENDIX F

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Attorneys for Defendants
FORD MOTOR COMPANY and DREW FORD

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

BENETTA BUELL-WILSON; BARRY S. WILSON,
Plaintiffs,

vs.

FORD MOTOR COMPANY, a Delaware Corporation;
DREW FORD, a California Corporation; and
DOES 1-50, inclusive,
Defendants

CASE NO. GIC800836

CRTM: Department 63
JUDGE: Hon. Kevin A. Enright

FORD MOTOR COMPANY AND DREW FORD'S PROPOSED SPECIAL JURY INSTRUCTIONS

DATE OF FILING: November 26, 2002
TRIAL DATE: November 14, 2003

Defendants Ford Motor Company and Drew Ford, Inc. submit the following proposed Special Jury Instructions:

* * * * *

SPECIAL JURY INSTRUCTION NO. 15
(Punitive Damages)

You may award punitive damages only if you find by clear and convincing evidence that the design of the Ford Explorer was so obviously and extremely defective that Ford had no arguably legitimate reasons for choosing that design and that it acted in a despicable manner. You may not award punitive damages if reasonable people could disagree about whether Ford's conduct was correct or lawful.*

* See BAJI 14.71, 14.72.1; Cal. Civ. Code § 3294; *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 4 490 (1915) ($6,300 civil penalty violated due process where defendant was "well justified in regarding its conduct] as reasonable and in acting on that belief" and even assuming that defendant "should have known that the Supreme Court of the State . . . might hold the [conduct] unreasonable"); *Kwan v. Mercedes-Benz of North*

America, Inc., 23 Cal. App. 4th 174, *Id* at 184-85 (1994) ("Neither punishment nor deterrent is ordinarily called for if the defendant's actions proceeded from an honest mistake or sincere and reasonable difference of factual evaluation. As our Supreme Court recently observed, 'courts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions.") (quoting *Lusardi Construction Co. v. Aubry* (1992) 1 Cal. 4th 976, 996-997) (internal quotations omitted); *see also Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal. App. 4th 335, 348, 350 and n.10 (when there is a "genuine dispute" over legal or factual issues, the evidence will not support punitive damages); *Silberg v. California Life Ins. Co.* (1974) 11 Cal. 3d 452, 462 (when the evidence showed an insurer was not put on notice by prior cases that its interpretation of policy was incorrect, the evidence did not support a award of punitive damages); *Opsal United Services Auto. Assn.* (1991) 2 Cal. App. 4th 1197, 1205 (reversing bad faith verdict of over $1,700,000 in compensatory and punitive damages against homeowner's insurer, which declined to pay property damage claim based on "genuine" policy dispute); *Mason v. Mercury Cas. Co.* (1976) 64 Cal. App. 3d 471, 474-75 (insurer's reasonable interpretation of contract, even if wrong, could not support malice finding); *Kendall Yacht Corp. v. United California Bank* (1975) 50 Cal. App. 3d 949, 958-59 (rejecting claim for punitive damages because it "remains purely speculative as to whether the Bank acted with such malice rather than out of a bona fide disagreement over how far the Bank was required to go helping the Kendalls with their financial problems"); *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating award in defective design case where "there is a genuine dispute in the scientific community as to" the reasonableness of the design).

* * * * *

SPECIAL JURY INSTRUCTION NO. 18
(Punitive Damages)

Punitive damages generally are not appropriate where a manufacturer has designed its product to meet or exceed government safety standards.*

* See *Ramirez v. Plough*, 6 Cal. 4th 539, 552-52 (1993) (declining to impose tort liability for "matters that are peculiarly susceptible to legislative and administrative investigation and determination, based upon empirical data and consideration of the viewpoint of all interested bodies"); *id.* at 555 (rejecting plaintiff's attempt to impose a duty to warn on drug manufacturers "that is broader in scope and more onerous than that imposed by applicable statutes and regulations"); *Macias v. State of California*, 10 Cal. 4th 844 (1995) (same). See also *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995) (fact that no governmental agency has ever required anything other than the allegedly defective feature is grounds for reversing jury award of punitive damages); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (holding evidence insufficient to support award of punitive damages in light of compliance with federal safety standards); *Drabik v. Stanley-Bostich, Inc.*, 997 F.2d 496, 510 (8th Cir, 1993); *Hutcherson v. Progressive Corp.*, 984 F.2d 1152, 1155 (11th Cir. 1993) (compliance with industry practice and custom is relevant to the punitive damage determination); *Cooper v. General Motors Corp.*, 702 So.2d 428, 434 (Miss. 1997) ("As a general rule, a state cannot impose common law damages on individuals for doing what a federal act or regulation authorized them to do."); *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993) (Compliance "is not the type of behavior which supports an award of punitive damages; indeed, punitive damages, the purpose of which is to 'punish, penalize or deter,' are, as a general rule, improper where a defendant has adhered to environmental and safety regulations."); *Chrysler Corp. v. Wolmer,*

499 So: 2d 823;826 (Fla. 1986) (evidence insufficient to support award of punitive damages in light of compliance with federal safety standards); *American-Law Institute, Reporter's Study: Enterprise Responsibility for Personal Injury*, Vol. II, at (1991) ("At a minimum,. such regulatory compliance should preclude the award of punitive damages."); *Prosser and Keeton on Torts*, § 36 at n.41 ("In most contexts . . . compliance with a statutory standard should bar liability for punitive damages."); David C. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 42 (1982) ("proof of compliance with the regulation or statute ordinarily should be deemed to be conclusive proof of good faith and hence a conclusive defense to a punitive damages claim."). *Cf. American Suzuki Motor Corp. v. Superior Court,* 37 Cal. App. 4th 1291, 1299-1300 (1995) ("The remedy which will best promote consumer safety, and which will address the real parties' concern that 'tragic consequences' will result if the defect is not remedied, is to petition the National Highway Traffic Safety Administration (NHTSA) for a defect investigation.").

* * * * *

SPECIAL JURY INSTRUCTION NO. 19
(Punitive Damages)

Punitive damages ordinarily cannot be awarded where the manufacturer has designed its product consistent with industry custom and practice.*

* See *Mason v. Mercury Cas. Co.*, 64 Cal. App. 3d 471; 475 (1977) (upholding grant of directed verdict for defendant on punitive damages where evidence showed that defendant's interpretation of disputed insurance contract provision conformed to standard practice within industry); *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995) (vacating punitive damage award where defendant's design was consistent with that of other manufacturers); *Drabik v. Stanley-Bostich, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) "[c]ompliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind"); *Hutcherson v. Progressive Corp.*, 984 F.2d 1152, 1155 (11th Cir. 1993) (compliance with industry practice and custom is relevant to the punitive damage determination); *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir. 1986) (punitive damages inappropriate where defendant's conduct was consistent with industry practice); *Cooper v. General Motors Corp.*, 702 So.2d 428, 434 (Miss. 1997) ("As a general rule, a state cannot impose common law damages on individuals for doing what a federal act or regulation authorized them to do."); *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993) (Compliance "is not the type of behavior which supports an award of punitive damages; indeed, punitive damages, the purpose of which is to 'punish, penalize or deter,' are, as a general rule, improper where a defendant has adhered to environmental and safety regulations."); *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 826 (Fla. 1986) (holding evidence insufficient to support award of punitive damages in light of compliance with federal safety standards); *American Law Institute, Reporter's Study:*

Enterprise Responsibility for Personal Injury, Vol. II at 101 (1991) ("At a minimum, such regulatory compliance should preclude the award of punitive damages."); *Prosser and Keeton on Torts*, § 36 at n.41 ("In most contexts . . . compliance with a statutory standard should bar liability for punitive damages."); David C. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 42 (1982) ("proof of compliance with the regulation or statute ordinarily should be deemed to be conclusive proof of good faith and hence a conclusive defense to a punitive damages claim.").

* * * * *

SPECIAL JURY INSTRUCTION NO. 27
(Punitive Damages)

In determining the appropriate amount of punitive damages, if any, in this case, you may consider only the harm to the plaintiffs. Any individuals other than the plaintiffs who might claim to have been harmed by Ford have the right to bring their own lawsuit seeking damages for any alleged injuries they may have incurred. Therefore, if you decide to award any punitive damages, your award must be limited to redressing the injuries incurred only by the plaintiffs in this lawsuit.*

* See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1523 (2003) ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant . . . Punishment on these bases creates the possibility of multiple punitive damage awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."); *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996); *Continental Trend Resources, Inc. v. Oxy USA, Inc.*, 101 F.3d 634, 640 (10th Cir. 1996) ("In figuring harm both actual and potential harm may be considered. But it must be harm to these plaintiffs, not to others."); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839, 839 (2d Cir. 1967) (Friendly, J.) ("The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. If all recovered punitive damages in the amount were awarded these would run into tens of millions, as contrasted with the maximum criminal penalty of 'imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.' . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.").

* * * * *

SPECIAL JURY INSTRUCTION NO. 28
(Punitive Damages)

In determining the proper amount of punitive damages, if any, you may not consider Ford's size, wealth, its overall profits and revenues, or its profits on the vehicle line.*

* See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1525 (2003) (because a defendant's wealth "bear[s] no relation to the award's reasonableness or proportionality to the harm . . . . [t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damage award"); *BMW of North Am. Inc. v. Gore*, 517 U.S. 559, 574-85 (1996) (wealth of defendant irrelevant to due process analysis; the "fact that [a] defendant is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several states impose on the conduct of its business."); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994) ("[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) ("the emphasis on the wealth of the wrongdoer increase[s] the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident"); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 n.16 (8th Cir. 1995); *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) ("[c]orporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law."); *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 932 F.Supp. 220, 223 (N.D. Ill. 1996) (Easterbrook, J., sitting by designation) (holding evidence of a defendant's wealth inadmissible under federal law to establish the proper amount of punitive damages

in part because, "even when considering punitive damages based on state law, the Supreme Court [in Gore] did not treat the defendant's wealth as relevant"); *American Law Institute, Reporters' Study: Enterprise Responsibility for Personal Injury*, Vol. 11, at 253-255 (1991); Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive damages in modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 950-52 (1989). *Cf. Adams v. Murakami*, 54 Cal. 3d 105, 119 (1991) (plaintiff must present evidence of defendant's financial condition for purposes of judicial review of award).

APPENDIX G

No. S146150
(Court of Appeal No. D045154)
(San Diego County Super. Ct. No. GIC800836)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BENETTA BUELL-WILSON and BARRY S. WILSON, *Plaintiffs and Respondents*,

v.

FORD MOTOR COMPANY and DREW FORD, *Defendants and Appellants*.

After a Decision By the Court of Appeal,
Fourth Appellate District, Division One

ANSWER TO PETITION FOR REVIEW

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Benetta Buell- Wilson and Barry S. Wilson

* * * * *

B. In Finding Ford's Conduct "Repeated," The Court Did Not Rely On Harm To Non-Party Explorer Drivers.

Ford's final argument is its most desperate: that the Court of Appeal improperly punished it for conduct to third parties when it allegedly found Ford's conduct reprehensibly repeated, rather than isolated, "because Ford mass-marketed the Explorer [and] Bronco II." Pet. 35-37. Ford thus requests a grant and hold pending *Philip Morris USA v. Williams* (U.S. Sup. Ct. No. 05-1256), which presents the issue "whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties." 126 S. Ct. 2329 (May 30, 2006) (order granting review, limited to Questions 1 and 2 of petition); 2006 WL 849860 (Mar. 30, 2006) (Petition).

But nothing in the Opinion suggests that Ford "repeated" its misconduct by selling Explorers to multiple buyers. Rather, the court noted that "Ford had a pattern of deficient safety design that was ignored in favor of increased financial returns . . . [as] evidenced by Ford's refusal to follow its engineers' recommendations to improve the stability of the Explorer." Opinion 60-61. This has nothing to do with Explorer buyers not before the court. Instead, what makes Ford's instances of conscious disregard in designing the Explorer the latest in a string of "repeated" misconduct is (1) Ford's similar prior misconduct in designing the Bronco II and other defective vehicles (such as the Pinto at issue in *Grimshaw*) and (2) the repeated decisions its management made while designing the Explorer that each favored financial returns over the safety of the occupants of its vehicles.

APPENDIX H

Court of Appeal, Fourth Appellate District, Div. 1 – Nos. D045154/D045579
S146150

IN THE SUPREME COURT OF CALIFORNIA

En Banc

BENETTA BUELL-WILSON et al., Plaintiffs and Respondents,

v.

FORD MOTOR COMPANY et al., Defendants and Appellants.

Petition for review is DENIED.

The requests for an order directing depublication of the opinion are denied.

GEORGE
Chief Justice

APPENDIX I

IN AND FOR THE COUNTY OF SAN DIEGO
CENTRAL DIVISION

Honorable Kevin A. Enright Department 63

BENETTA BUELL-WILSON, BARRY S. WILSON,	)	
Plaintiffs,	)	
vs.	)	G1C800836
	)	Trial
FORD MOTOR COMPANY, a Delaware Corporation; and DOES 1-50, inclusive,	)	
Defendants.	)	

Reporter's Transcript of Proceedings

May 24, 2004

Reported by:

Donna L. Foster, CSR No.
7698
San Diego Superior Court
Hall of Justice, Department 63
330 West Broadway
San Diego, California 92101

* * * * *

INSTRUCTIONS TO THE JURY BY THE COURT

If you decide that Ford Motor Company's conduct caused Benetta Wilson and Barry Wilson harm, you must decide whether that conduct justifies an award of punitive damages. The amount, if any, of punitive damages will be an issue decided later.

At this time, you must now decide whether Benetta Wilson and Barry Wilson have proved that Ford Motor Company engaged in that conduct with malice, oppression, or fraud. To do this, Benetta Wilson and Barry Wilson must prove one of the following by clear and convincing evidence;

1: That the conduct constituting malice, oppression or fraud was committed by one or more officers, directors, or managing agents of Ford Motor Company, acting in a corporate capacity;

Or 2: That the conduct constituting malice, oppression or fraud was authorized by one or more officers, directors or managing agents of Ford Motor Company;

Or 3: That one or more officers, directors or managing agents of Ford Motor Company knew of the conduct constituting malice, oppression or fraud, and adopted or approved that conduct after it occurred.

"Malice" means that Ford Motor Company acted with intent to cause injury or that Ford Motor Company's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangers, consequences of his or her conduct and deliberately failed to avoid those consequences.

"Oppression" means that Ford Motor Company's conduct was despicable and subjected Benetta Wilson and/or Barry Wilson to cruel and unjust hardship and a knowing disregard of their rights.

"Despicable conduct" is conduct that is so mean, vile, base or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that Ford Motor Company intentionally misrepresented or concealed the material fact and did so intending to deprive Benetta Wilson and Barry Wilson of property or of a legal right or otherwise to cause Benetta Wilson and Barry Wilson injury.

An employee is a managing agent if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporation policy.

IN AND FOR THE COUNTY OF SAN DIEGO
CENTRAL DIVISION

Honorable Kevin A. Enright Department 63

BENETTA BUELL-WILSON, BARRY S. WILSON,	)	
Plaintiffs,	)	
vs.	)	G1C800836
	)	Trial
FORD MOTOR COMPANY, a Delaware Corporation; and DOES 1-50, inclusive,	)	
Defendants.	)	

Reporter's Transcript of Proceedings

June 2, 2004

Reported by:

Donna L. Foster, CSR No. 7698
San Diego Superior Court
Hall of Justice, Department 63
330 West Broadway
San Diego, California 92101

* * * * *

THE COURT: Ladies and gentlemen, it's about seven minutes after noon. I know we are into the lunch hour. And you have been very patient this morning. But what I would like to do is give you the instructions now, the instructions -- these instructions are additional to the instructions that I gave you before. In other words, those instructions stand. These are additional relevant to this phase. And they are not as lengthy as the instruction on the first phase. So if it's all right, I would like to instruct you then it will be submitted to you. Is that okay? Okay.

Thank you. You must now decide the amount if any you should award Benetta Wilson and Barry Wilson in punitive damages. The purpose of punitive damages are to punish a wrongdoer and to discourage -- let me ask counsel. I have I think the prior version and what we wanted to do is simply substitute the pronoun. In other words --

Let me start that last sentence over again.

The purposes of punitive damages are to punish a wrongdoer and to discourage it and others from similar conduct in the future. There is no fixed standard for determining the amount of punitive damages and you are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following separately for each -- for the defendant. A, how reprehensible was the defendant's conduct; B, is there a reasonable relationship between the amount of punitive damages and Benetta Wilson's and Barry Wilson's harm; C, in view of the defendant's financial condition, what amount is necessary to punish it and discourage future wrongful conduct.

You should keep in mind that compensatory damages, although awarded to compensate plaintiffs for their injuries, also may affect -- have the effect of punishing and deterring misconduct. Therefore, in determining whether and in what amount to award any punitive damages, you should consider the deterrence and punishment imposed solely by any compensatory damages you may award and when added to the sum you have already imposed as compensatory damages.

In determining the amount of punitive damages, if any, that is necessary to achieve the proper level of punishment and deterrence, you may consider only Ford's wrongful conduct, if any, that has had an adverse impact on the citizens of California. Accordingly, you may not award any punitive damages for the purpose of punishing Ford for the

sale of vehicles in other states for any injuries that may have occurred in other states, or for the purpose of changing Ford's conduct in other states.

Punitive damages must bear a reasonable relationship to compensatory damages.

APPENDIX J

CIVIL CODE

Division 4. General Provisions

Part 1. Relief

Title 2. Compensatory Relief

Chapter 1. Damages in General

Article 3. Exemplary Damages

Cal Civ Code § 3294 (2006)

§ 3294. When permitted

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Chapter 4 (commencing with Section 377.10) of Title 3 of Part 2 of the Code of Civil Procedure based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377.62 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.